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Supreme Court of the United States

OCTOBER TERM, 1958

No. 885

OWENSBORO ON THE AIR, INC., and
OWENSBORO PUBLISHING COMPANY, *Petitioners*

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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May 1, 1959.

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OWENSBORO PUBLISHING COMPANY, *Petitioners*

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on December 18, 1958, by a panel of three judges, one judge dissenting, and the order of the Court denying a petition for rehearing *en banc*, entered on February 2, 1959.

OPINION BELOW

The opinion of the Court of Appeals (App. 1a-16a) has been reported in 262 F. 2d 702 (1958). The Report and Order of the Federal Communications Commission (R. 15-37) has been reported at 15 Pike

& Fischer R.R. 1573 and its Memorandum Opinion and Order (R. 52-55) has been reported at 15 Pike & Fischer R.R. 1586e.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on December 18, 1958, and an order denying a petition for rehearing *en banc* was entered on February 2, 1959. (App. 17a) The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code, Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C. 1254(1) and 64 Stat. 1132, 5 U.S.C. 1040.

QUESTION PRESENTED

Under Section 4 of the Administrative Procedure Act (60 Stat. 238, 5 U.S.C. 1003) which requires, first, that there shall be publication of notice of proposed rule making, and second, that there shall be opportunity for participation in the rule making proceeding by interested persons, may the Federal Communications Commission on the basis of a Notice of Rule Making specifically proposing only a change in the classification of VHF Channel 7 in Evansville, Indiana, by changing the designation of that channel from commercial to educational, amend its Table of Television Assignments contained in its Rules and Regulations by deleting commercial VHF Channel 9 from Hatfield, Indiana, while that channel was involved in an adjudicatory proceeding between competing applicants, without first issuing and publishing a notice of further rule making proposing such Channel 9 amendment and affording interested and affected parties an opportunity to participate in the proceeding.

STATUTE INVOLVED

The pertinent provisions of Section 4 of the Administrative Procedure Act (60 Stat. 238, 5 U.S.C. 1003) are as follows:

> "Sec. 4(a) Notice.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. . . .
>
> "Sec. 4(b) Procedures.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. . . ."

STATEMENT

Owensboro On The Air, Inc. and Owensboro Publishing Company, petitioners herein and hereinafter called petitioners, are applicants in an adjudicatory proceeding still pending before the Federal Communications Commission for a new television station in Hatfield, Indiana, on Channel 9, which channel was allocated and made available for use there as the result of a specific rule making proceeding initiated by the petitioners.

While the above adjudicatory proceeding was in full progress, the Commission on June 26, 1956, issued a Notice of Proposed Rule Making proposing to amend the Table of Television Assignments contained in Section 3.606(b) of its Rules and Regulations by reallocating television assignments in Evansville, Indiana, so as to change the educational reservation in that city from Channel 56 to Channel 7. The notice is entitled "Amendment of Section 3.606, Table of Assignments, Television Broadcast Stations (Evansville, Indiana)", and its first paragraph states that "Notice is hereby given in the above-entitled matter". (R. 1-2)

The notice specifically states that "the Commission is proposing the following channel changes:

City	Channel No. Present	Channel No. Proposed
Evansville, Indiana	7, 50, *56, 62	*7, 50, [illegible], 62"

(The asterisk indicates that the channel is reserved for educational use.) (R. 1-2)

The above Notice of Rule Making contains no proposal for, and gives no notice of, any amendment to the Commission's Rules involving deletion of Channel 9 from Hatfield and its assignment to Evansville. Neither Hatfield, Indiana, nor Channel 9 then assigned to Hatfield, is mentioned anywhere in the notice. On the contrary, in a Public Notice released simultaneously with the above Notice of Rule Making on June 26, 1956, the Commission specifically stated that "only" VHF Channel 7 in Evansville was involved. (R. 78)

The Evansville Channel 7 Notice of Rule Making provided for the filing of comments supporting or

opposing the proposed amendment to make Channel 7 in Evansville educational and also provided for the filing of comments in reply to original comments. (R. 1-2)

Petitioners filed no comments since the Notice contained no proposal affecting Channel 9 in Hatfield and failed to indicate that Channel 9 was involved in any way.

On December 3, 1956, the last day provided for the filing of comments, the two Evansville UHF stations (WFIE and WEHT) filed joint comments supporting the Commission's proposal to make Channel 7 in Evansville educational and they also urged "that Channel 9, allocated in Hatfield, Indiana. be reserved for educational use in Hatfield-Owensboro area". Mid-America Broadcasting Company of Louisville, Kentucky, also filed comments dealing primarily with the reallocation of Channel 7 from Evansville to Louisville, and in addition, requested that the Commission take action concerning reallocation or outright deletion of Channel 9 from Hatfield, Indiana. (R. 9-11)

Petitioners gained knowledge of these comments and the new and counterproposals through receipt of courtesy copies by mail. On December 28, 1956, petitioners filed a special Motion to Strike such portions of the above comments as involved the new proposals concerning the deletion, removal or reservation for educational use of the Hatfield Channel 9 assignment on the ground that they were not within the scope of the Evansville Notice of Rule Making and that no notice of proposed rule making had been issued with respect to Channel 9 in Hatfield as required by Section 4 of the Administrative Procedure Act. (R. 13-15)

The Commission did not dispose of the Motion to Strike until its final Report and Order wherein it amended the Table of Television Assignments by deleting Channel 9 from Hatfield, and the regulation thereupon became an accomplished fact. (R. 15-35)

An appeal was taken to the United States Court of Appeals for the District of Columbia Circuit. Petitioners' sole contention was that the Commission's action in amending the Table of Television Assignments contained in its Rules and Regulations by deleting Channel 9 from Hatfield, Indiana, on the basis of a notice of rule making specifically proposing only a change in channels in Evansville, Indiana, violated the notice and procedural provisions of Section 4 of the Administrative Procedure Act and deprived petitioners of both notice and an opportunity to demonstrate to the Commission that the proposed amendment was not in the public interest.

A three judge panel of the Court of Appeals (with Circuit Judge Fahy dissenting) held that petitioners had "actual notice" both of the proposed rule making and of the subjects and issues involved "as required by Section 4(a) of the Act" and that there was no denial of opportunity to participate fully in the rule making proceeding. (App. 1a-14a)

Circuit Judge Fahy issued a dissenting opinion in which he stated that considering the requirements of Section 4(a) of the Administrative Procedure Act, he was unable to construe the notice released by the Commission as adequate to support its order and that the Commission must carefully comply with the provisions Congress has provided for notice. (App. 15a-16a) Judge Fahy's dissent is as follows:

"The Administrative Procedure Act[1] provides two important safeguards for the protection of private rights in agency rule making by requiring, first, that there shall be publication of notice of proposed rule making, and secondly, that there shall be opportunity for participation by interested persons.

"Section 4(a) provides that notice of proposed rule making shall be published in the Federal Register and must include, among other things, 'either the terms or substance of the proposed rule or a description of the subjects and issues involved.' Section 4(b) provides that after notice has been issued, 'the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner. . . .' In rule making proceedings the provisions as to notice and public participation must be read together.

"Considering the requirements of §4(a), I am unable to construe the notice which was released by the Commission on June 26, 1956, as adequate to support the order of the Commission. The notice is entitled 'Amendment of Section 3.606, Table of Assignments, Television Broadcast Stations (Evansville, Indiana)'; its first paragraph states that 'Notice is hereby given of rule making in the above-entitled matter.' The notice goes on in the second paragraph to announce that the Commission proposes changes in certain existing and named channels—some are to remain in Evansville while others will be reassigned elsewhere as specified. Neither Hatfield, Indiana, nor channel 9 then assigned to Hatfield, is mentioned anywhere in the notice; yet the Commission has ordered that the Table of Assignments contained in

[1] 60 Stat. 237, 5 U.S.C. §§ 1001-11 (1952).

Section 3.606 of its Rules and Regulations be amended to delete VHF television channel 9 from Hatfield, and to reassign it to Evansville for educational purposes. The legislative history of the Administrative Procedure Act makes clear that the notice issued by the agency in compliance with the mandate of §4(a) 'must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto,' and that 'where notice is required, it should be complete and specific."[2]

"My view I think is fortified by the fact that channel 9 was sought to be brought into the Evansville proceedings by a counter-proposal. This counter-proposal, however, was objected to and the Commission delayed ruling on the objection until it was overruled simultaneously with the order eliminating channel 9 from Hatfield. If the Commission was to eliminate channel 9 it should have ruled on the objection to its involvement in the Evansville proceedings before actually deleting it from Hatfield.

"Our review of the merits of Commission decisions is limited. One of the justifications for the limitation falls away if the parties are not afforded a full opportunity to be heard before the Commission itself. It is important, therefore, that the Commission carefully comply with the provisions Congress has provided for notice." (App. 15a-16a).

[2] S. Doc. No. 248, 79th Cong., 2d Sess. 200 (1946).

REASONS FOR GRANTING THE WRIT

This case involves the important and fundamental question of whether there has been agency compliance with the rule making provisions of the Administrative Procedure Act concerning notice and public procedure, which were enacted by the Congress for the protection

of the rights of interested and affected persons. The Court below has decided a question relating to the construction and application of Section 4 of the Administrative Procedure Act, which question has not been, but should be, settled by this Court.

The decision below is a far-reaching one which nullifies the plain provisions of Section 4 of the Administrative Procedure Act with regard to notice and public participation and ignores the intention of Congress as expressed at the time of enactment of those provisions. The decision, in effect, approves a plan of convenience for the Commission and other federal administrative agencies in rule making proceedings as a substitute for compliance with the rule making notice requirements of Section 4 of the Act, in derogation of the rights of interested and affected persons. The decision affirms the Commission's action destroying the procedural rights established by Congress in Section 4 of the Act, and is an open invitation for the Commission and other administrative agencies to treat those procedural rights with impunity or to ignore them entirely. This case is one of broad significance and the decision, if permitted to stand, will have a serious and detrimental effect upon public rights in all federal rule making proceedings.

The majority decision is contrary to the views and recommendation contained in the 1958 Report of the Committee on Communications of the Administrative Law Section of the American Bar Association (R. 118-122) and is in conflict with the principle enunciated by the United States Court of Appeals for the Ninth Circuit in *Hotch* v. *United States*, 212 F. 2d 280, 282-3 (1954), that there must be strict compliance with the Congressional directive in the Administrative Pro-

cedure Act in regard to the procedure to be followed in the issuance of agency regulations.

This Court should determine the true meaning of the notice and public procedure provisions of the Act and by opinion make such meaning known for future guidance of the Courts and federal administrative agencies and for the protection of the rights of the public.

The Court Below Misconstrued and Misapplied the Plain Terms of Section 4 of the Act Contrary to the Intention of Congress as Expressed at the Time of Enactment

As set forth in the dissenting opinion of Circuit Judge Fahy, the Administrative Procedure Act provides two important safeguards for the protection of private rights in agency rule making by requiring, first, that there shall be publication of notice of proposed rule making, and secondly, that there shall be opportunity for participation by interested persons.

Section 4(a) of the Act dealing with Notice provides that *notice of proposed rule making shall be published in the Federal Register* "unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law" and shall include "either the terms or substance of the proposed rule or a description of the subjects and issues involved". Section 4(b) of the Act dealing with Procedure provides that after notice has been issued, "the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner . . ." In rule making proceed-

ings the provisions as to notice and public participation must be read together.[1]

The legislative history of the Administrative Procedure Act makes clear that the agency notice provided in Section 4(a) "must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument"[2] and that "where notice is required, it should be complete and specific".[3] Legislative history also makes clear that Section 4(b) guarantees interested persons an opportunity to participate in rule making at least to the extent of submitting written data, views or argument, and that the purpose of the provision is "to enable parties to express themselves in some informal manner prior to the issuance of rules and regulations, so that

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[1] In rule making procedures, the provisions as to notice (Section 4(a)) and public participation (Section 4(b)) must be read together. Section 4(a) of the Act "governs the application of the public procedures required by section 4(b) since those procedures only apply where notice is required by this section." (House Committee Report, 1946, p. 24; S. Doc. 248, 79th Congress, p. 258; also, see Senate Committee Report, 1945, p. 14; S. Doc. 248, 79th Congress, p. 200.)

[2] "Agency notice must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto." (Senate Committee Report, 1945, p. 14; S. Doc. 248, 79th Congress, p. 200.) "Notice must fairly apprise interested persons of the issues involved, so that they may present relevant data or argument. * * * Statements of issues in the general statutory language of legislative delegations of authority to the agency would not be compliance with the section." (House Committee Report; 1946, p. 24; S. Doc. 248, 79th Congress, p. 258.)

[3] "There are two particularly important aspects of section 4(a), which deal with the notice of rule making. In the first place, where notice is required, it should be complete and specific as the subsection indicates on its face. * * *" (92nd Congressional Record 5650; S. Doc. 248, 79th Congress, p. 358.)

they will have been consulted before being faced with the accomplished fact of a regulation which they may not have anticipated or with reference to which they have not been consulted".[4]

The Court Erred in Holding That the Petitioners Had Actual Notice of the Proposed Rule Making and of the Subjects and Issues Involved as Required by Section 4(a) of the Act

The Court below recognized that "the notice of rule making did not mention Channel 9" (App. 6a) but concluded erroneously that petitioners had both "actual notice" and a description of the subjects and issues involved as required by Section 4(a) of the Act. (App. 9a, et seq.)

A reading of Section 4(a) of the Act will clearly show that petitioners did not have "actual notice" as required by that section. Comments filed by other

[4] "The second subsection of section 4 is designed to provide that, where other statutes do not require an agency hearing, the legislative function in administrative agencies shall, so far as possible, be exercised only upon some form of public participation after notice." • • •

"The effect of this provision will be to enable parties to express themselves in some informal manner prior to the issuance of rules and regulations, so that they will have been consulted before being faced with the accomplished fact of a regulation which they may not have anticipated or with reference to which they have not been consulted. This provision will make for good public relations on the part of administrative agencies. Wisely used and faithfully executed, as it must be, it should be of great aid to administrative agencies by affording them a simple statutory means of apprising the public of what they intend to do and affording the interested public a nonburdensome method of presenting its side of the case. Day by day Congress takes account of the interests and desires of the people in framing legislation, and there is no reason why administrative agencies should not do so when they exercise legislative functions which the Congress has delegated to them." (92 Congressional Record 5650; S. Doc. 248, 79th Congress, pp. 358-359.)

persons in response to the Commission's Evansville Channel 7 notice of rule making did not enlarge the agency notice or constitute actual notice of rule making with regard to any new proposals or counterproposals contained therein, within the meaning of Section 4(a).

Section 4(a) provides that agency notice of proposed rule making shall be published in the Federal Register "*unless all persons subject thereto are named and* either personally served or otherwise *have actual notice thereof* in accordance with law" (Emphasis added.) Section 4(a) deals with publication of agency notice and provides that "the only exception from the necessity of publication is where the persons subject to a particular rule are specifically named, and even then only if they are also either personally served or have actual notice". (*Hotch* v. *United States*, 212 F. 2d 280, 282, Footnote 7.) The thrust of the provision is to require the agency to give formal notice of its intention before rule changes are made.

In the instant case the Commission published its notice of rule making with respect to Channel 7 at Evansville in the Federal Register. It did not name the petitioners or any other persons in the notice of rule making as "persons subject thereto". Consequently, no question of "actual notice" of the possible involvement of Channel 9 at Hatfield is or could be presented or supported.

The Court's holding that actual notice of comments containing new and counterproposals filed in response to the Commission's notice of rule making constitute "actual notice", "just as Section 4(a) requires" (App. 9a) is clearly erroneous. Section 4(a) deals only with actual notice of agency notice. The Court

obviously misconstrued and misapplied the "actual notice" provision of Section 4(a).

Furthermore, as stated above, Section 4(a) of the Act provides that the agency notice shall include "either the terms or substance of the proposed rule or a description of the subjects and issues involved". The published notice with respect to Channel 7 at Evansville did not mention Channel 9 at Hatfield and did not contain the terms and substance of any proposed change to delete Channel 9 from Hatfield. It is obvious, therefore, that the notice was not "complete and specific" and that the description of the subjects and issues involved was not "sufficient to fairly apprise interested parties of the issues involved," so that they could "present responsive data or argument".

The following statement from the dissenting opinion of Circuit Judge Fahy precisely covers the point and demonstrates the error in the majority opinion:

> "Considering the requirements of § 4(a), I am unable to construe the notice which was released by the Commission on June 26, 1956, as adequate to support the order of the Commission. The notice is entitled 'Amendment of Section 3.606, Table of Assignments, Television Broadcast Stations (Evansville, Indiana)'; its first paragraph states that 'Notice is hereby given of rule making in the above-entitled matter.' The notice goes on in the second paragraph to announce that the Commission proposes changes in certain existing and named channels—some are to remain in Evansville while others will be reassigned elsewhere as specified. Neither Hatfield, Indiana, nor channel 9 then assigned to Hatfield, is mentioned anywhere in the notice; yet the Commission has ordered that the Table of Assignments contained in Section 3.606 of its Rules and Regulations be amended to delete

> VHF television channel 9 from Hatfield, and to reassign it to Evansville for educational purposes. The legislative history of the Administrative Procedure Act makes clear that the notice issued by the agency in compliance with the mandate of § 4(a) 'must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto', and that 'where notice is required, it should be complete and specific'. (S. Doc. No. 248, 79th Cong., 2d Sess. 200 (1946)). * * * "

It is clear that the basic holding of the Court below that petitioners "had actual notice both of the proposed rule making and of the 'subjects and issues involved', just as Section 4(a) requires" and that "there were both actual notice and a description of the subjects and issues involved as required by Section 4(a)" is clearly erroneous. (App. 9a, 12a)

The Court Erred in Holding That There Was No Denial of Opportunity to Participate Fully in the Rule Making Proceeding

As stated above, Section 4(b) of the Act guarantees interested persons an opportunity to participate in rule making at least to the extent of submitting written data, views or argument. The purpose of the provision is to enable interested parties to express themselves prior to the issuance of rules and regulations so that they will have been consulted before being faced with the accomplished fact of a regulation.

Since the Commission's notice of rule making admittedly did not mention the removal of Channel 9 from Hatfield and dealt only with Channel 7 in Evansville, the notice presented no issue to which the petitioners or members of the public in Hatfield could

possibly present responsive data or argument on the dates specified for filing comments and counter-proposals.

The new proposals and counterproposals concerning the deletion or reservation of Channel 9 which were filed by WFIE and WEHT and Mid-America on the last day for filing comments, did not come to the attention of the petitioners until after the time for filing comments had expired. The only opportunity for participation at that stage of the proceeding was limited under the terms of the Commission's notice to the filing of "replies" to the original comments, which is clearly not the "opportunity to participate" through the submission of data responsive to issues or proposals contained in the agency's notice as prescribed by Section 4(b).

In holding that after the issuance of the Commission's final Report and Order in the rule making proceeding on March 1, 1957, the petitioners "had full opportunity, then and there to act, with detailed knowledge of all aspects of that Report and Order" (App. 11a), the Court misconceives entirely the purpose of Section 4(a) and (b) of the Act. A final report and order in a rule making proceeding can hardly be substituted for a preliminary notice of rule making initiating the proceeding. Any opportunity to file for reconsideration of such final report and order obviously is not the full opportunity to participate in the rule making proceeding as provided by Section 4(b). After the Commission issued its final report and order the rule making proceeding as such was at an end and the petitioners were faced with the accomplished fact of a regulation.

It can hardly be seriously urged that notice and knowledge of the contents of a final report and order in a rule making proceeding and the opportunity for requesting reconsideration thereof can be legally substituted for notice of rule making and opportunity to participate therein as provided by Section 4(a) and (b) of the Act.

The Court's holding that there was no showing that petitioners "were deprived of opportunity in any measure to take whatever steps their own situation might suggest, whether by way of counterproposal and comment or by evidence to establish their own position" (App. 14a), is clearly erroneous. As shown above, because of the defective notice, there was no stage of the proceeding at which petitioners could have filed original comments or counterproposals. The Commission's Evansville Channel 7 notice made no reference to Hatfield Channel 9 and thus presented no issue to which the petitioners, or other interested members of the public in Hatfield, could logically file comments or counterproposals within the time prescribed for filing such comments.

A Notice of Further Rule Making Was Required

The Court below vitiated the general purpose and meaning of Section 4 of the Act by approving Commission consideration of the new proposals and counterproposals concerning the deletion of Channel 9 from Hatfield which were outside the scope of the original Evansville Channel 7 notice of rule making, without first requiring the Commission to issue a notice of further rule making.

The procedure governing the filing and consideration of counterproposals in response to rule making

proposals of the Federal Communications Commission has been treated as a matter of great importance and has been given thorough study by the Committee on Communications of the Administrative Law Section of the American Bar Association. In its 1958 Report, the Committee considered at length the question "whether Commission consideration of counter-proposals not within the ambit of the original notices of proposed rule making is contrary to the letter and spirit of Section 4 of the APA." (R. 118-122) The Committee concluded as follows:

> "In view of the fact that Section 4 of the APA strives to insure public notice of the substance of administrative rule making (with the exceptions listed in the Act), it seems clear to this Committee that the general purpose and meaning of Section 4 is vitiated by the failure of the Commission to provide notice of counter-proposals by means of publication in the Federal Register or other procedures sanctioned by Section 4 . . ." (R. 121)

The Committee further stated that it was aware of the practical difficulties involved with regard to possible protraction of the rule making proceeding but held as follows:

> "However, the possibility of interminable protraction of rule making proceedings is not in itself justification for not abiding by the requirements of the Administrative Procedure Act rather than providing a procedural technique which would permit both compliance with the APA and serve administrative convenience." (R. 121)

Notices of Further Proposed Rule Making have been issued by the Commission in the following, among other, television rule making proceedings in order to afford interested and affected parties an opportunity to comment on alternate or counterproposals after the issuance of the original notice: Youngstown, Ohio, New Castle, Pittsburgh, Pennsylvania, FCC Docket 11280, 20 F.R. 6562; Shinglehouse, York, Lancaster, Harrisburg, Williamsport, Pennsylvania, FCC Docket 11499, 21 F.R. 5656; Peoria, Illinois, Davenport, Iowa-Rock Island-Moline, Illinois, FCC Docket 11749, 21 F.R. 5657; Springfield, Illinois, St. Louis, Missouri, FCC Docket 11747, 21 F.R. 7959; Bozeman-Helena-Butte, Montana, FCC Docket 11798, 21 F.R. 8542; New Orleans, Louisiana-Mobile, Alabama, FCC Docket 11752, 22 F.R. 501; Providence, Rhode Island, New Haven, Connecticut, Portland, Maine, FCC Docket 11957, 22 F.R. 728; Vancouver, Washington, FCC Docket 11877, 22 F.R. 4165; Albany-Schenectady-Troy and Vail Mills, New York, FCC Docket 11751, 22 F.R. 4505; Columbus, Georgia, FCC Docket 12054, 23 F.R. 489.

The Commission's action in issuing notices of further rule making in the foregoing and other proceedings indicates an awareness of the true meaning and requirements of the Act.

CONCLUSION

In view of the importance and widespread impact of the decision of the Court below, your petitioners respectfully pray that a writ of certiorari be granted under the seal of this Court directed to the United States Court of Appeals for the District of Columbia

Circuit, and for such further relief as to this Court may seem proper.

Respectfully submitted,

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May 1, 1959.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13776

OWENSBORO ON THE AIR, INC., and
OWENSBORO PUBLISHING COMPANY, PETITIONERS,

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS,

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,
INTERVENOR,

MID-AMERICA BROADCASTING CORPORATION, INTERVENOR,

WEHT, INC., INTERVENOR.

No. 13777

OWENSBORO ON THE AIR, INC., and
OWENSBORO PUBLISHING COMPANY, APPELLANTS,

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE,

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,
INTERVENOR,

MID-AMERICA BROADCASTING CORPORATION, INTERVENOR.

No. 14044

OWENSBORO ON THE AIR, INC., and
OWENSBORO PUBLISHING COMPANY, APPELLANTS,

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE,
AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., INTERVENOR,
MID-AMERICA BROADCASTING CORPORATION, INTERVENOR,
WEHT, INC., INTERVENOR.

No. 14046

EVANSVILLE TELEVISION, INC., APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE,
WEHT, INC., INTERVENOR.

No. 14047

EVANSVILLE TELEVISION, INC., PETITIONER,

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS,
WEHT, INC., INTERVENOR.

No. 14049

OWENSBORO ON THE AIR, INC., and
OWENSBORO PUBLISHING COMPANY, PETITIONERS,

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS,

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.
INTERVENOR,

MID-AMERICA BROADCASTING CORPORATION, INTERVENOR,

WEHT, INC., INTERVENOR.

On Petitions for Review and Appeals from Orders of the Federal Communications Commission

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Decided December 18, 1958

Mr. Joseph Zias for Owensboro on the Air, Inc., petitioner in Nos. 13776 and 14049 and appellant in Nos. 13777 and 14044. *Mr. Philip G. Loucks* also entered an appearance for Owensboro on the Air, Inc., petitioner, in No. 13776 and appellant in No. 13777. *Mr. Maurice M. Jansky* also entered an appearance for Owensboro on the Air, Inc., appellant in No. 14044.

Mr. Robert N. Green, with whom *Messrs. Vincent B. Welch, Harold E. Mott* and *Edward P. Morgan* were on the brief, for Evansville Television, Inc., appellant in No. 14046 and petitioner in No. 14047.

Mr. Russell Rowell was on the brief for Owensboro Publishing Company, petitioner in Nos. 13776 and 14049 and

appellant in Nos. 13777 and 14044. *Messrs. Frank U. Fletcher* and *Robert H. Heald* also entered appearances for Owensboro Publishing Company, petitioner in No. 14044.

Mrs. Ruth V. Reel, Counsel, Federal Communications Commission, with whom *Messrs. Warren E. Baker*, General Counsel, Federal Communications Commission, at the time the brief was filed, *Richard A. Solomon*, Assistant General Counsel, Federal Communications Commission, *Richard M. Zwolinski*, Counsel, Federal Communications Commission, and *Daniel M. Friedman*, Attorney, Department of Justice, were on the brief, for appellee-respondents. *Mr. Charles C. McCarter*, Attorney, Federal Communications Commission, also entered an appearance for appellee-respondent Federal Communications Commission in Nos. 14046 and 14047.

Mr. J. Roger Wollenberg, with whom *Mr. Andrew G. Haley* was on the brief, for intervenor Mid-America Broadcasting Corporation in Nos. 13776, 13777, 14044 and 14049.

Messrs. James A. McKenna, Jr., and *Vernon L. Wilkinson* were on the brief for intervenor American Broadcasting-Paramount Theatres, Inc., in Nos. 13776, 13777, 14044 and 14049.

Messrs. Bernard Koteen and *Alan Y. Naftalin* were on the brief for intervenor WEHT, Inc.

Before FAHY, DANAHER and BASTIAN, *Circuit Judges*.

DANAHER, *Circuit Judge*: We are here asked to review another phase of the vexatious UHF-VHF conflict which has long engaged the Commission and which on several occasions has come to this court.[1] This time we are con-

[1] See, e.g., Coastal Bend Television Co. v. Federal Communications Commission, 98 U.S. App. D.C. 251, 234 F. 2d 686 (en banc, 1956); Greylock Broadcasting Company v. United States, 97 U.S.

cerned with Evansville, Indiana, and the area adjacent thereto.

Owensboro on the Air, Inc., and Owensboro Publishing Company had been engaged in adjudicatory proceedings testing their comparative qualifications for an award of VHF Channel 9 in Hatfield, Indiana.[2] The Commission had made no award. These parties will hereinafter be referred to as Owensboro-appellants. Evansville Television, Inc., herein referred to as Evansville-WTVW, is a permittee which, since September 1956, has been operating on VHF Channel 7 in Evansville, Indiana.

Basically, the foregoing parties here contend that the Commission's rule making is technically invalid and thus that the deletion of VHF Channel 9 from Hatfield is illegal. The Commission's notice of proposed rule making in Docket No. 11757 specifically prescribed a contemplated plan to require all commercial television operations emanating from Evansville to utilize UHF channels. It was expressly noticed that VHF Channel 7 at Evansville

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App. D.C. 414, 231 F. 2d 748 (1956); Springfield Television Broadcasting Corp. v. Federal Communications Commission, —— U.S. App. D.C. ——, 259 F. 2d 170 (1958); and WIRL Television Company v. United States, 102 U.S. App. D.C. 341, 253 F. 2d 863 (1958), *cert. granted, judgment vacated on other grounds*, —— U.S. —— (Oct. 20, 1958). By our order, the Clerk of this Court directed all parties in the instant case to inform us as to the possible existence of circumstances such as caused the Supreme Court to vacate our judgment in the WIRL case. We accept the assurances of all parties that there are no such circumstances here present.

[2] VHF Channel 9 was a "drop-in" channel not allocated to Hatfield, Indiana, under the Commission's 1952 Sixth Report and Order but was found thereafter to be permissible under later-evolved engineering limitations. Compare the Vail Mills Channel 10 "drop-in" in Greylock Broadcasting Company v. United States, *supra* note 1, and Van Curler Broadcasting Corp. v. United States, 98 U.S. App. D.C. 432, 236 F. 2d 727 (*en banc*, 1956), *cert. denied*, 352 U.S. 935 (1956).

was to be reserved for educational use, should the proposal be adopted. No construction permit had ever been issued for operation on VHF Channel 9 at Hatfield, and the notice of rule making did not mention Channel 9. Accordingly it is argued that the notice was fatally defective because of the Commission's alleged failure to comply with the notice requirements of § 4(a) of the Administrative Procedure Act which reads in pertinent part:

> "Sec. 4(a). Notice.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include . . . (3) either the terms or substance of the proposed rule *or a description of the subjects and issues involved.*" (Emphasis added.)

In *Jacksonville Journal Co.* v. *Federal Commun. Com'n*, 101 U.S.App.D.C. 12, 13, 246 F.2d 699, 700 (1957), we noticed that the Commission's Report and Order in Docket No. 11532 had followed our *Coastal Bend* decision.[3] Therein the Commission had specified certain criteria which were to be deemed generally applicable in dealing with the problem of interim action. The Commission had indicated that a "basic choice" in many markets might require the elimination of VHF channels in order to create improved opportunities for UHF broadcasting. 13 PIKE & FISCHER RADIO REG. 1571, 1581, 1582. On the same day, June 26, 1956, in Docket No. 11757, 21 Fed. Reg. 4972, the Commission gave notice of proposed rule making and specifically called attention to its Report and Order in Docket No. 11532, in accordance with the general objectives of which its interim program of channel reassignments was to be undertaken. The Commission proposed

[3] *Supra* note 1.

that VHF Channel 7 in Evansville be reserved for educational use and that UHF Channel 56 in Evansville be released from educational reservation so that Evansville would have UHF Channels 50, 56 and 62 for commercial use. The same notice of rule making further specified that:

> "Any interested party who is of the view that the proposed amendment should not be adopted, *or should not be adopted in the form set forth herein*, may file with the Commission on or before September 10, 1956, a written statement setting forth his comments." (Emphasis added.)

In addition, parties submitting comments were expressly requested "to direct their attention to the matters discussed in paragraph 31 of the Commission's Report and Order issued today in Docket No. 11532." Thus incorporated by reference in No. 11757 were the criteria spelled out in detail in Docket No. 11532. The Commission explained:

> "Because of the widely varying circumstances in individual markets and the numerous factors which bear on the choice of techniques in any individual community or area, it is not possible to formulate rigid criteria whose perfunctory application to individual cases will automatically indicate the course which would best serve the public interest in each community during the interim period. We have concluded, however, after extensive review of all the proposals which have been submitted to us for the elimination or addition of commercial VHF assignments, that the following considerations will have important bearing on decisions in specific communities or areas."[4] 21 Fed. Reg. 4958, 4962.

Pursuant to the Commission's invitation that comments or counterproposals be submitted, on July 13, 1956, Mid-America Broadcasting Corp., intervenor herein, and permittee of WKLO-TV, Channel 21 at Louisville, Kentucky,

[4] Docket No. 11532, 13 PIKE & FISCHER RADIO REG. 158.

asked that VHF Channel 7 be allocated to Louisville rather than be retained in Evansville on a reserved basis.[5]

Evansville-WTVW on August 24, 1956, requested withdrawal of the Commission's June 26, 1956, notice of proposed rule making in Docket No. 11757. Evansville-WTVW correctly contended that as permittee of VHF Channel 7 it was entitled to a full evidentiary hearing under § 316 of the Communications Act. The Evansville-WTVW petition was denied by the Commission in a memorandum and order adopted November 28, 1956, released December 3, 1956. The Commission there noted that the "Notice of Proposed Rule Making in Docket No. 11757, to which petitioner objects, is *merely a proposal* which may or may not be adopted in the form proposed. *Only after consideration of the requested comments and any counterproposals that may be submitted* will we be in a position to judge the proposal on its merits, both legal and factual." (Emphasis added.)

Thereupon, under date of December 3, 1956, Mid-America filed its comments and counterproposal that Channel 7 be reallocated to Louisville, that Channel 9 be reallocated or be deleted from Hatfield, Indiana, and that certain UHF channels be allocated to Evansville and Hatfield. The intervenors, Premier Television, Inc., permittee of UHF Station WFIE in Evansville and WEHT, Inc., permittee of UHF Station WEHT at Henderson, Kentucky, also on December 3, 1956, jointly submitted comments urging that the Commission's original proposal be adopted with reference to VHF Channel 7. They specifically further asked that commercial TV channels "in the Evans-

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[5] On October 22, 1956, the Commission denied the Mid-America counterproposal and similar proposals submitted by other Kentucky residents. The Commission indicated that such counterproposals would be considered in the Evansville de-intermixture proceeding and accordingly, there was no necessity for amending the Notice of Rule Making or for instituting further rule making to incorporate the Louisville proposal. 21 Fed. Reg. 8196.

ville, Indiana market" be made exclusively UHF. These intervenors additionally urged that VHF Channel 9, allocated at Hatfield, Indiana, "be reserved for educational use in the Hatfield-Owensboro area."

Evansville-WTVW under date of December 28, 1956, filed extensive comments not only with reference to the Commission's proposal but to the comments and counterproposals of WFIE and WEHT. It argued the demerits of the plan to delete both VHF Channels 7 and 9.

The Owensboro-appellants, on the other hand, chose not to argue the merits. Instead, they contented themselves with filing a motion "to strike comments or so-called counterproposals filed in the above-entitled proceeding relating to the removal, reservation for educational purposes, or the deletion of Channel 9 from Hatfield, Indiana." Their pleading discloses their complete awareness of the Commission's proposal and of the counterproposals. They filed no comments nor did they otherwise propose participation in the rule making proceedings. On the contrary, they stood simply on their claim that the Commission must strike all proposals and counterproposals looking to the deletion or change in designation of VHF Channel 9 at Hatfield solely on the ground, as they alleged, that the June 26, 1956, notice of proposed rule making had failed to comply with the requirements of § 4(a) of the Administrative Procedure Act. But they had actual notice both of the proposed rule making and of the "subjects and issues involved," just as § 4(a) requires.

The Commission on March 1, 1957, released its Report and Order:[6] VHF Channel 9 was deleted from Hatfield and assigned to Evansville for use as a noncommercial education station;—UHF Channel 56 was allocated to Owensboro for commercial telecasting; Evansville-WTVW pursuant to the requirements of § 316 of the Communications Act of 1934[7] was ordered to show cause why VHF

[6] 22 Fed. Reg. 1499.

[7] 47 U.S.C. § 316 (1952).

Channel 7 should not be reallocated to Louisville, and its entitlement to a hearing with reference thereto was recognized; and—at the same time, UHF Channel 31 was allocated to Evansville,[8] there to be available for commercial telecasting by Evansville-WTVW in the event that the Commission should ultimately decide that Channel 7 should be reallocated to Louisville. (Other actions then taken are not here pertinent.)

The Commission noted in its March 1, 1957, "Report and Order":

> "Our June 26, 1956 Notice of Proposed Rule Making stated that the instant proceeding is being conducted in furtherance of our program for improving the opportunities for effective competition among a greater number of stations in specific areas, which program was enunciated in our June 26, 1956 Report and Order in the general television allocations proceeding (Docket No. 11532).[11] Since the need for area deintermixture was treated at some length in the Report and Order, all parties were on notice that the instant proceeding, as well as the other deintermixture proceedings, concern the need for and advisability of area deintermixture. Unquestionably Evansville and Hatfield, being only about 21 miles apart, are in the same general area.[12] The untena-

[11] Both of these June 26, 1956 releases (Notice in this proceeding and the Report and Order in Docket 11532) were duly published in the Federal Register. This constitutes constructive notice of all parties under prevailing statutes.

[12] The record discloses that Station WTVW on Channel 7 in Evansville puts a Grade A signal over Hatfield, and that both of the Hatfield Channel 9 applicants propose to provide Evansville with a Grade A signal."

[8] Compare the WIRL situation, *supra* note 1, where as part of this same 13 community interim program, appellant desired the VHF Channel 8, not the UHF Channel 25 it received.

bility of the Hatfield applicants' motion to strike is further demonstrated by the fact that the WFIE and WEHT counterproposal to delete or reserve for education Channel 9 was included as an integral part of their initial comments in this proceeding, which comments were filed on December 3, 1956. Reply comments were timely if filed by December 28, 1956. The Channel 9 applicants were thus afforded an ample opportunity to submit comments in opposition to this counterproposal. We need not decide whether these Hatfield applicants had constructive notice of the filing of the WFIE and WEHT counterproposal, since they unquestionably had actual notice of this filing some time prior to December 28, 1956. The Hatfield applicants could not otherwise have filed their motion to strike on that date."

The Owensboro-appellants thus again had full opportunity, then and there to act, with detailed knowledge of all aspects of that Report and Order. They were already in the case as parties. Even were it to be granted that there was some substance to their claim of lack of earlier notice of the full import of the contemplated rule making, after their motion to strike had been denied and the Commission's Report and Order had issued on March 1, 1957, they certainly were fully advised in the premises. They could have sought reconsideration under § 405 of the Act.[9] But they chose to take no further steps.

It is clear that the Commission concluded, in its competence, to "de-intermix" the Evansville area and so allocated only UHF channels for telecasting in that market, thus seeking to achieve the objectives spelled out in detail in its Memorandum and Order in Docket No. 11532.[10]

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[9] 47 U.S.C. § 405 (1952). The petition for reconsideration filed by Evansville-WTVW was denied by the Commission's Memorandum Opinion and Order released June 24, 1957.

[10] We do not discuss the merits of the position of Evansville-WTVW with reference to the reallocation of VHF Channel 7, because of the pending hearing.

That the Commission in a rule making proceeding may take such action is no longer open to question.[11]

The case, then, comes to this: is an otherwise valid determination by the Commission to be voided for its failure to include in the original proposal a suggestion that its de-intermixture program might require the deletion of VHF Channel 9? We answer in the negative, particularly on the facts of this case. We have no intention whatever of accepting a Commission's plan of convenience as a substitute for compliance with the rule making notice requirements of § 4 of the Administrative Procedure Act. Here, however, there were both the actual notice and a description of the subjects and the issues involved as required by § 4(a), within our holding in *Logansport Broadcasting Corp.* v. *United States, supra* note 11. Section 4(a), we there said, "requires only that the prior notice include 'a description of the subjects and issues involved.' We think the procedure followed by the Commission amply fulfilled this requirement. . . . Surely every time the Commission decided to take account of some additional factor it was not required to start the proceedings all over again. If such were the rule the proceedings might never be terminated." 93 U.S.App.D.C. at 346, 210 F.2d at 28.

There was far more than the concise general statement of the basis and purpose of the amended rules which we approved in *Van Curler Broadcasting Corp.* v. *United States, supra* note 2, required by § 4(b). There was no denial of opportunity to the parties to participate as fully as they chose. To avoid the Commission's rule making here would be an exercise in sheer stultification. The facts compel a realistic appraisal of the background for the action by the Commission which we now affirm.

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[11] Peoples Broadcasting Co. v. United States, 93 U.S. App. D.C. 78, 209 F. 2d 286 (1953); Zenith Radio Corp. v. Federal Communications Com'n, 93 U.S. App. D.C. 284, 211 F. 2d 629 (1954); Logansport Broadcasting Corp. v. United States, 93 U.S. App. D.C. 342, 210 F. 2d 24 (1954); and see notes 1 and 2 *supra*.

Hatfield, Indiana, is a community of some 2,500 population. It may be supposed no one will contend a listening audience limited to that community can support a television station. Owensboro on the Air, Inc., tells us in its brief that the VHF Channel 9 "drop-in" was the result of its own engineering study. In seeking the allocation, it represented to the Commission that "the assignment of Channel 9 to Hatfield will result in the assignment of a channel to a community to which no assignment now exists and will provide a second channel to serve the needs and interests of Owensboro *and its environs*, thus fostering competition between television stations in the public interest as contemplated by the Communications Act." (Emphasis added.)

Of course that was true. There were only two VHF channels allocated to communities within 75 miles of Evansville. One was VHF Channel 9 and the other was VHF Channel 7. Any action as to reallocation or use which might affect one inevitably would affect the other. Allocations of television channels were not to post office sites but to the area to be served. Owensboro is only 10 miles from Hatfield. Evansville is only 21 miles from Hatfield. The Owensboro-appellants themselves, obviously, sought to serve, not Hatfield as such, but "Owensboro and its environs," and both actually proposed to put a Grade A signal over Evansville. That situation had long since given rise to a series of de-intermixture proposals with reference to this very area. Commencing as early as October, 1954, the juxtaposition of VHF Channels 7 in Evansville and 9 in Owensboro had been the subject of challenge, followed by Commission consideration and rule making.

Finally, on November 10, 1955, the Commission dismissed the various rule making proceedings,[12] and at the

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[12] 13 PIKE & FISCHER RADIO REG. 1511; 20 Fed. Reg. 8495 where it will be seen, appellants-petitioners here with variods of the in-

same time initiated the new rule making proceeding, Docket No. 11532, *supra*. The Commission's action was then attacked in this court with the appeals consolidated under the caption of *Coastal Bend Television Co. v. Federal Communications Commission, supra* note 1. There we sustained the Commission. We did so again in *Gerico Investment Co. v. Federal Commun. Com'n*, 99 U.S.App.D.C. 379, 240 F.2d 410, on January 17, 1957. All of these actions antedated the Commission's June 26, 1956, Report and Order in Docket No. 11532 and its initiation the same day of Docket No. 11757, here involved. We need not repeat but merely refer to the steps which followed, narrated above. If the purpose of notice when required in any case is to *give notice*, the appellants-petitioners here had it.[13] There is no showing that they were deprived of opportunity in any measure to take whatever steps their own situation might suggest, whether by way of counterproposal and comment or by evidence to establish their own position. That they are not happy over the result is clear. That they sustained legal injury is not.

Affirmed.

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tervenors had been parties to rule making proceedings in Docket No. 11334 involving these very channels and, in substance, the same proposals and counterproposals.

[13] It has been urged that Hotch v. United States, 212 F. 2d 280 (9 Cir. 1954), should control here. There the court was not concerned with the sufficiency of a notice of rule making which had been published in the Federal Register, as happened in this case. On the contrary the court pointed out "that since neither the proposed regulation nor the regulation itself . . . were ever published, the regulation is not valid . . . ." *Id.* at 284. Thus the failure to publish as a prerequisite to the issuance of a regulation making certain acts criminal was held to preclude a conviction. Clearly no such situation exists in the instant case.

FAHY, *Circuit Judge, dissenting:* The Administrative Procedure Act[1] provides two important safeguards for the protection of private rights in agency rule making by requiring, first, that there shall be publication of notice of proposed rule making, and secondly, that there shall be opportunity for participation by interested persons.

Section 4(a) provides that notice of proposed rule making shall be published in the Federal Register and must include, among other things, "either the terms or substance of the proposed rule or a description of the subjects and issues involved." Section 4(b) provides that after notice *has been issued*, "the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner. . . ." In rule making proceedings the provisions as to notice and public participation must be read together.

Considering the requirements of § 4(a), I am unable to construe the notice which was released by the Commission on June 26, 1956, as adequate to support the order of the Commission. The notice is entitled "Amendment of Section 3.606, Table of Assignments, Television Broadcast Stations (Evansville, Indiana)"; its first paragraph states that "Notice is hereby given of rule making in the above-entitled matter." The notice goes on in the second paragraph to announce that the Commission proposes changes in certain existing and named channels—some are to remain in Evansville while others will be reassigned elsewhere as specified. Neither Hatfield, Indiana, nor channel 9 then assigned to Hatfield, is mentioned anywhere in the notice; yet the Commission has ordered that the Table of Assignments contained in Section 3.606 of its Rules and Regulations be amended to delete VHF television channel 9 from Hatfield, and to reassign it to Evansville for

[1] 60 Stat. 237, 5 U.S.C. §§ 1001-11 (1952).

educational purposes. The legislative history of the Administrative Procedure Act makes clear that the notice issued by the agency in compliance with the mandate of § 4(a) "must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto," and that "where notice is required, it should be complete and specific."[2]

My view I think is fortified by the fact that channel 9 was sought to be brought into the Evansville proceedings by a counter-proposal. This counter-proposal, however, was objected to and the Commission delayed ruling on the objection until it was overruled simultaneously with the order eliminating channel 9 from Hatfield. If the Commission was to eliminate channel 9 it should have ruled on the objection to its involvement in the Evansville proceedings before actually deleting it from Hatfield.

Our review of the merits of Commission decisions is limited. One of the justifications for the limitation falls away if the parties are not afforded a full opportunity to be heard before the Commission itself. It is important therefore, that the Commission carefully comply with the provisions Congress has provided for notice.

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[2] S. Doc. No. 248, 79th Cong., 2d Sess. 200 (1946).

On Petitions for Review and on Appeals from Orders of the Federal Communications Commission.

Before: Fahy, Danaher and Bastian, Circuit Judges.

Judgment

These cases came on to be heard on the records from the Federal Communications Commission, and were argued by counsel.

On consideration whereof, it is ORDERED and ADJUDGED by this court:

(1) that appeals Nos. 13,777, 14,044 and 14,046 are dismissed;

(2) that the petition for review in No. 13,776 is dismissed as premature;

(3) that on the petitions for review in Nos. 14,047 and 14,049 the orders of the Federal Communications Commission dated March 29, 1957 and June 24, 1957, are affirmed.

Per Circuit Judge Danaher.

Dated: December 18, 1958.

Separate dissenting opinion by Circuit Judge Fahy.

Order

Upon consideration of the petition for rehearing in banc, it is

ORDERED by the court that the petition for rehearing in banc is denied.

Per Curiam.

Dated: February 2, 1959.

Circuit Judge Miller did not participate in this order.

FILE COPY

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 889

DOUGLAS H. McDONALD, TRUSTEE, *Petitioner*

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, and WEHT, INC., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

DOUGLAS H. MCDONALD, TRUSTEE, *Petitioner*

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, and WEHT, INC., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The Report and Order of the Federal Communications Commission is unofficially reported at 15 Pike & Fischer R.R. 1573, and begins at page 15 of the Joint Appendix. The Memorandum Opinion and Order of the Commission denying a petition for reconsideration is unofficially reported at 15 Pike & Fischer R.R. 1586, and begins at page 52 of the Joint Appendix.

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 262

E. 2d 702 (1958), and is contained in Appendix A to this petition. The Order of the Court of Appeals denying a petition for rehearing en banc is contained in Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on December 18, 1958. An order denying a petition for rehearing en banc was entered by the Court of Appeals on February 2, 1959.*

The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code, Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C., § 1254 (1), and Section 402 (j) of the Communications Act of 1934, Act of June 7, 1934, c. 426, 48 Stat. 926, as amended, 47 U.S.C., § 402 (j).

QUESTIONS PRESENTED

1. Are the notice requirements of Section 4 of the Administrative Procedure Act satisfied where the Federal Communications Commission issues a notice of proposed rule making inviting comments on one rule (a television channel assignment), and as its final action in the proceeding, adopts a different rule (channel assignment) that appeared only in a private person's comments and never in a public notice of the agency?

2. Is it rational for the Federal Communications Commission to delete Channel 9 from Hatfield, Indiana, on the premise that Channel 7, Evansville, is simultaneously being deleted, when, in fact, Channel 7, Evansville, is not being simultaneously deleted?

* After the petition for rehearing was denied, Douglas H. McDonald, Trustee, was substituted for Evansville Television, Inc., as appellant-petitioner.

STATUTE INVOLVED

This case involves Section 4 of the Administrative Procedure Act, 5 U.S.C. § 1003, which, in pertinent part, is as follows:

> "(a) NOTICE.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include . . . (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. * * *
>
> "(b) PROCEDURES.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner * * *."

STATEMENT OF THE CASE

Section 3.606 of the Federal Communications Commission's Rules is a community by community listing of all television assignments. Since the adoption of the Table of Assignments on April 14, 1952, many proceedings of limited scope have been held for the purpose of considering changes in specific allocations set forth in the Table. These have been written rule making proceedings involving the submission of comments and reply comments. The instant case was such a proceeding.

The case, as finally decided by the Commission, concerned VHF Channel 7, Evansville, Indiana, and VHF Channel 9, Hatfield, Indiana, a community 21 miles from Evansville. Petitioner, Douglas H. McDonald (hereinafter called WTVW), has since February 11, 1959, been the permittee of Television Station WTVW, Channel 7, Evansville, Indiana, having suc-

ceeded to the Channel 7 permit as a consequence of his being appointed Trustee of Evansville Television, Inc., in a proceeding under Chapter X of the Bankruptcy Act. Evansville Television, Inc., received a grant of Channel 7, on December 27, 1955, at the end of a comparative hearing, and began operation of Television Station WTVW on August 21, 1956. Channel 9, Hatfield, has been the subject of a comparative hearing between Owensboro On The Air, Inc., and Owensboro Publishing Company (hereinafter referred to as the Channel 9 applicants).

On June 26, 1956, the Commission issued a Notice proposing to delete Channel 7 as a commercial assignment and to reserve the channel for educational use, as follows:

In the Matter of

Amendment of Section 3.606,

Table of Assignments,

Television Broadcast Stations
(Evansville, Indiana)

NOTICE OF PROPOSED RULE MAKING

1. Notice is hereby given of rule making in the above-entitled matter.

2. The Commission today adopted a Report and Order in its general television allocation proceeding in Docket No. 11532, outlining a long-range program designed to improve the television allocation structure and at the same time specifying the basis on which it would consider channel changes in the interim with the view to improving the immediate television situation in individual communities. As a part of this interim program of channel reassignments and in accordance with the general objectives outlined in the above Report and Order, the Commission is proposing the following channel changes:

City—Evansville, Indiana

Channel No.
Present—7, 50, *56, 62
Proposed—*7, 50, 56, 62

(Offset carrier designations for the various channels will be specified in the final Report and Order.)

3. Any interested party who is of the view that the proposed amendment should not be adopted, or should not be adopted in the form set forth herein, may file with the Commission on or before September 10, 1956, a written statement setting forth his comments. Comments supporting the proposed amendment may also be filed on or before the same date. Comments in reply to original comments may be filed within 15 days from the last date for filing said original comments. No additional comments may be filed unless (1) specifically requested by the Commission or (2) good cause for the filing of such additional comments is established.

4. Parties submitting comments in this proceeding are requested to direct their attention to the matters discussed in paragraph 31 of the Commission's Report and Order issued today in Docket No. 11532. All data indicating television coverage should be filed in accordance with the procedures specified in paragraphs 38-40 of the above Report and Order.

* * * *

[The asterisk before a channel assignment indicates that the channel is reserved for non-commercial eductional use.]

On July 13, 1956, Mid-America Broadcasting Corporation, a company owning a radio station in Louisville, Kentucky, filed a petition suggesting that Channel 7, Evansville, be shifted to Louisville rather than reserved in Evansville for educational use. On Octo-

ber 22, 1956, the Commission issued a Memorandum Opinion and Order giving notice that Mid-America's proposal that Channel 7 be reallocated to Louisville could properly be considered as a counterproposal in the Evansville proceeding.

On December 3, 1956, the last day for filing comments in the proceeding, WEHT and WFIE, WTVW's two Evansville UHF competitors, filed joint comments supporting the plan to delete Channel 7 from Evansville, and, for the first time, introducing a new plan to delete Channel 9 from Hatfield. There was no requirement of service, but courtesy copies of these comments were mailed to WTVW and the Channel 9 applicants.

On December 28, 1956, the date for filing reply comments, the Channel 9 applicants filed a motion to strike the comments proposing the deletion of Channel 9 from Hatfield on the ground that that proposal was outside the scope of the June 26th Notice (J.A., pp. 13-15). The Channel 9 applicants made no arguments on the merits with respect to Channel 9.

WTVW's comments of December 3, 1956, were directed to opposing the only proposals then outstanding, viz., the educational reservation of Channel 7 or the transfer of the channel to Louisville. In its reply comments of December 28, 1956, it pointed out at length that Section 4 of the Administrative Procedure Act precluded consideration of the deletion of Channel 9 in the proceeding, and also briefly opposed the suggestion that Channel 9 be deleted from Hatfield, not as comments on the merits of the proposal, but to urge that the Commission reject the proposal at the threshhold without issuing a further notice of rule making. Although voluminous comments were filed in opposition to the deletion of Channel 7 before the final de-

cision, no other statements were filed in opposition to the deletion of Channel 9.

On March 1, 1957, the Commission issued a final Report and Order in this proceeding proposing to delete Channel 7 from Evansville in an adjudicatory proceeding which it instituted that same day. It deleted Channel 9 from Hatfield and shifted it to Evansville where it is now an educational reservation. The Commission in that Report and Order denied the motion to strike of the Channel 9 applicants and rejected the similar arguments of WTVW as to the absence of notice (J.A., pp. 31-32; par. 28, March 1, 1957 Report and Order).

The Channel 9 applicants went directly to the Court of Appeals from the March 1, 1957, Report and Order. WTVW, on the other hand, petitioned for reconsideration, urging that the Commission had violated Section 4 of the APA in failing to give notice that Channel 9 might be deleted in the case. On June 24, 1957, the Commission denied WTVW's petition for reconsideration, and stated in support of its rejection of the notice arguments:

> "It is well established that the Commission is not confined to the adoption of amendments as specifically proposed in Notices of Proposed Rule Making but may also consider, and where it finds appropriate, adopt counterproposals falling within the general scope of the rule making proceeding." (J.A., p. 53; par. 3, June 24, 1957 Memorandum Opinion and Order)

On July 24, 1957, WTVW filed a notice of appeal from the action of the Commission deleting Channel 9 in the United States Court of Appeals for the District of Columbia Circuit, pursuant to Section 402(b) of the Communications Act of 1934, as amended, 66

Stat. 718, 47 U.S.C. Sec. 402 (b). WTVW simultaneously filed a petition for review pursuant to Section 402 (a) of the Communications Act of 1934, as amended, 66 Stat. 718, 47 U.S.C. Sec. 402 (a). WTVW's cases were consolidated with the appeals of the Channel 9 applicants from the deletion of Channel 9.

On December 18, 1958, a division of the Court of Appeals, by a 2-1 vote, affirmed the Commission's order. Judges Danaher and Bastian voted to affirm, and Judge Fahy dissented.

The majority concluded that "there were both the actual notice and a description of the subjects and the issues involved as required by Sec. 4 (a)" (p. 12, Slip Opinion), because WTVW and the Channel 9 applicants had "actual notice" of the existence of comments proposing the deletion of Channel 9, and because they should have inferred from the background and history of proposals for deintermixture of the Evansville-Hatfield area, that a notice of rule making proposing the deletion of Channel 7, Evansville, opened the proceeding to the deletion of Channel 9, Hatfield.

Judge Fahy, in his dissent, stated that the Notice was inadequate to support the deletion of Channel 9, since it did not fairly apprise interested parties of the issues involved; that the legislative history of Section 4 of the APA demonstrates that "where notice is required, it should be complete and specific"; and that the Commission was obliged to rule on the objections to the involvement of the deletion of Channel 9 before deleting it from Hatfield.

WTVW's petition for rehearing en banc was denied on February 2, 1959.

REASONS FOR GRANTING THE WRIT

I. THE NOTICE QUESTION

A. Introduction

This case presents an important question of interpretation of the notice procedures which Congress has imposed on administrative agencies in the exercise of their rulemaking functions. Such procedures are designed to afford all interested persons an opportunity to express their views on a potential rule *before* the rule is adopted. In Section 4 (a) of the APA, Congress has placed an affirmative burden of the agency to follow certain publication and notice procedures. However, the decision of the Commission, affirmed by the Court of Appeals, whittles away the established statutory safeguards by proclaiming the power of an agency to issue a limited notice and then to allow private persons to define the scope of the rulemaking proceeding. The effect is to require interested persons to proceed at their peril to guess what a rulemaking proceeding encompasses. The majority below has adopted an interpretation of Section 4 which is in conflict with that of the Ninth Circuit, as reflected by the Ninth Circuit's opinion in *Hotch* v. *United States*, 212 F. 2d 280 (1954).

B. The decision of the Court of Appeals is in derogation of the requirement of "complete and specific" notice of the subject matter of a rulemaking proceeding.

The Notice, reproduced in pertinent part above, contains no mention of Channel 9 or Hatfield. In addition, the caption of the Notice states only "Evansville, Indiana"; paragraph 2 of the Notice talks about "improving the immediate television situation in individual *communities*" (emphasis supplied); and the only city whose assignments are listed is Evansville, and the only VHF channel mentioned for possible deletion is Channel 7. This Notice clearly did not by

its terms give notice that this proceeding concerned "area" deintermixture. To the contrary, this Notice, by its terms, gave notice that this proceeding concerned "community" deintermixture, that is, the deletion of a VHF channel from the individual community of Evansville, and not the completely separate Hatfield community 21 miles from Evansville.

One of the grounds the Commisison relied on in denying the motion to strike of the Channel 9 applicants was its statement that the June 26, 1956, Report and Order (13 Pike & Fischer R.R. 1571) concluding the general television allocations proceeding, which was issued simultaneously with the Notice here, gave notice that the Commission was here concerned with "area" deintermixture, and Evansville and Hatfield are in the same general area. (References to the June 26 Report and Order appear in paragraphs 2 and 4 of the June 26 Notice.) However, in paragraph 2 of the Notice, the Commission indicated that the Report and Order related to deintermixture of "individual communities," not to "areas." Further, in the June 26, 1956. Report and Order, the Commission had said:

> ". . . the object of the proceeding . . . was to reach a decision as to the basic lines on which it would be in the public interest to revise the nationwide television system, and thus provide a basis for determining the specific reassignments which could usefully be made in *individual communities* in conformity with the nationwide policies adopted herein." (emphasis supplied) 13 Pike & Fischer R.R., at p. 1573)
>
> * * *
>
> ". . . the proponents of deintermixture have advocated the elimination of some or all of the VHF channel assignments in designated *cities*. . . . Thus, deintermixture has the dual aspect of re-

ducing or eliminating VHF assignments in some *communities* and of increasing the number of VHF assignments in others . . . It does not appear, however, that deintermixture at this stage would be practical in a sufficient number of *communities* representing a sufficiently large segment of the total population to provide significantly enhanced opportunities for the fuller utilization of the UHF channels on a nationwide basis." (emphasis supplied) (13 Pike & Fischer R.R., at p. 1576)

Since throughout the June 26, 1956, Report and Order the Commission spoke of "community" deintermixture, and at times of "community or area" deintermixture; the Report and Order was so ambiguous that it cannot be regarded as giving notice that proceedings such as the instant one concerned "area" deintermixture. Certainly, under these circumstances, private persons had a right to rely on the terms of the Notice itself, which defined the proceeding as limited to changes with respect to VHF Channel 7.

If this proceeding encompassed the potential deletion of Channel 9, Hatfield, it was a simple matter for the Commission to say so in its original Notice, or to issue a further or amended notice to that effect. In 1955 the Commission had held a rulemaking proceeding in which its notice did propose the deletion of both Channel 7, Evansville, and Channel 9, Hatfield. The failure of the Commission here to issue a similar notice appeared to be a purposeful limitation by the Commission of this proceeding to consideration of changes only with respect to Channel 7. In the general allocations proceeding prior to this case comments had been filed proposing the deletion of both Channel 7, Evansville, and Channel 9, Hatfield, so that when the Commission issued its Notice in this case without mentioning Channel 9, the logical conclusion was that

the Commission had decided that the potential deletion of Channel 9 was beyond the scope of this proceeding. The majority below refers to these and other background events to support its conclusion that there was a description of the subjects and issues involved (pp. 13-14, Slip Opinion), but it is from this very background that one would deduce that comments suggesting the deletion of Channel 9 were attempting to introduce an extraneous element into the proceeding. Moreover, the majority below was legally wrong in relying on events prior to June 26, 1956 (the date of the Notice), for there is no hint in the Notice that the public must delve into such antecedent matters to understand the scope of the proceeding.

However, the entire approach of the majority below is contrary to Section 4. It has gone through a lengthy analysis to determine what the June 26 Notice meant. In doing this, it has, in effect, held that there is an obligation on a private person to deduce, reason, and infer from documents and events within and without the proceeding to determine what actions the agency may lawfully take in the proceeding. However, Congress placed the burden of giving notice on the agency; interested persons should not be required to conjecture as to the bounds which the agency has placed on the proceeding. As Judge Fahy points out in his dissent, the notice contemplated by the Administrative Procedure Act must be "complete and specific":

> "The legislative history of the Administrative Procedure Act makes clear that the notice issued by the agency in compliance with the mandate of Sec. 4 (a) 'must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto,' and that 'where notice is required, it should be complete and specific.'" [S. Doc. No. 248, 79th Cong., 2d Sess. 200 (1946)] (p. 16, Slip Opinion)

And as the Attorney General's Manual on the Administrative Procedure Act observes:

> "Where there is a 'description of the subjects and issues involved', the notice should be sufficiently informative to assure interested persons an opportunity to participate intelligently in the rule making process. Final Report, p. 108". (pp. 29-30 of Manual).*

C. The Commission's counterproposal procedure is in conflict with the notice requirements governing legislative rule making proceedings contained in Section 4 of the Administrative Procedure Act.

A grave danger to the rights of private persons lies in the Commission's reliance here on a power to adopt "counterproposals falling within the general scope of the rule making proceeding" without giving public notice of the nature of counterproposals. Television allocations are handled, by the Commission's own choice, in *public* rule making proceedings, legislative in nature, in which any person has the right to file comments in support of or in opposition to a proposed revision of the Table of Assignments. It is impossible for the Commission or any one else to know who will regard themselves as interested in or affected by a particular potential change in the Table of Assignments and who will, hence, desire to file comments. The Commission recognizes this because it does not require that comments (including comments that contain counterproposals) be served on any one. Where an agency cannot know all the persons interested in a counterproposal set forth in comments, it should follow, as a matter of law, that it must give public notice of the substance of a counterproposal, for otherwise it may be depriving interested persons of their right to file comments directed to the potential rule.

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* See also *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314-315 (1940).

Even assuming that WTVW and the Channel 9 applicants had reason to know that Channel 9 might be deleted under the Notice as it stood (and, as shown above, this was not the case), other persons interested in opposing the deletion of Channel 9 from Hatfield had no way of knowing that the possible deletion of Channel 9 was the subject matter of the proceeding and they had no opportunity to file comments. Vigorous popular feeling invariably arises where there is a plan to delete a VHF channel. A VHF assignment affords wide area coverage, which is something UHF channels are inherently unable to do. In all rule making cases that have been held involving the potential deletion of a VHF channel (e. g., the Peoria, Madison, Springfield (Ill.), and Hartford cases), a wide variety of persons and organizations have made their views in opposition to the deletion of the VHF channel known to the Commission. The present record contains much material, including comments, letters, and petitions by the Chamber of Commerce of Evansville, civic organizations, and other persons in opposition to the deletion of *Channel 7*. (See the Commission's reference to this fact at R. 757; J.A., p. 19). In the 1955 rule making proceeding, where the Commission gave notice that Channel 9, Hatfield, might be deleted (and where deletion of Channel 9 was rejected), there was a tremendous amount of material in opposition to the deletion of Channel 9, Hatfield, from the Chambers of Commerce of Hatfield, Indiana, and Owensboro, Kentucky, businessmen, civic organizations, governmental agencies, and private citizens in those cities. In contrast, this record is devoid of such material in opposition to the deletion of Channel 9. That three persons (the petitioners) knew that someone had filed comments suggesting that Channel 9 be deleted did not suffice to give notice to the many other members of the public who were interested in and affected by the rule.

The "counterproposal" procedure thus has the evil effect of converting proceedings which are supposed to be public into private ones, where only persons who happen to receive a copy of comments have any notion as to what potential allocation changes may be adopted and persons who do not learn of "counterproposals" which adversely affect their interests are deprived of the opportunity to express their opposition in advance of a "counterproposal" becoming a final rule. Section 4(b) of the APA provides that after notice has been given, the agency shall afford "interested persons" an opportunity to submit their views, but this Congressional direction is defeated by the "counterproposal" procedure.

In addition, even persons who receive comments containing "counterproposals" are deprived of the opportunity to comment effectively and intelligently. Any suggested change in the Table of Assignments is susceptible of many variations. In response to a plan to delete Channel 8 from city A and to reassign it to city B, someone may file comments proposing that Channel 8 be reassigned to city C instead of city B; someone else may suggest that Channel 8 be reassigned to city D instead of city B; someone else may suggest that Channel 5 as well as Channel 8 be deleted from city A; and someone else may support the shifting of Channel 8 to city B and also propose that Channel 12 be shifted from city D to city B. There are thus all sorts of gradations of new proposals that could be and *are* suggested in comments,* which makes it impossible to give any practical definitive meaning to "counterproposals falling within the general scope of the proceeding", a phrase which the Commission has never

*In the Madison Deintermixture Case, 15 Pike & Fischer R.R. 1563, participants suggested about 10 variations on the Commission's proposal to reserve Channel 3, Madison, for education.

attempted to define. Since no one can know if a "counterproposal" is relevant to the case, confusion reigns as to which proposals contained in comments are legitimate "counterproposals", and the confusion is not eliminated until the Commission issues its final order. It is unfair for persons to be required at their peril to expend time and money to oppose "counterproposals" which are advanced with negligible supporting data, or which appear to be beyond the scope of the proceeding or obviously without merit, or which the Commission ultimately rejects as on their face not in the public interest. Fatal errors of judgment can be made in this jungle of doubt as to what is the scope of the proceeding. The chaos that pervades these proceedings should be eliminated by this Court granting certiorari and ruling that "counterproposals" have no standing until they are acknowledged by the agency as having prima facie merit by the publication of a notice inviting comments.

The Commission's counterproposal procedure has been considered by the Committee on Communications of the Administrative Law Section of the American Bar Association, which submitted a report in 1958 concluding that it is unlawful, referring to the facts of this case. The Report of that Committee is reproduced in Appendix C hereto.

D. The case involves an important problem as to the meaning of "actual notice", as used in Section 4 of the Administrative Procedure Act.

The Commission concluded that the Channel 9 applicants had actual notice that Channel 9 might be deleted since they had filed a motion to strike comments suggesting the deletion of Channel 9. The Court of Appeals also concluded that there was actual notice. Both the Commission and the Court meant that

WTVW and the Channel 9 applicants had "actual notice" of the existence of comments suggesting the deletion of Channel 9. However, Section 4 (a) authorizes the agency to dispense with publication of notice where the persons subject to the rule making have "actual notice" of *the agency's notice of rule making*, not of what is said in a private person's pleading.

Of course, WTVW and the Channel 9 applicants had "actual notice" that comments suggested that Channel 9 be deleted, for they received the WFIE-WEHT comments in the mail, but they did not have "actual notice" (and did not know) that Channel 9 might be deleted in the proceeding. Only the latter kind of notice, which was not present, is meaningful.

"Actual notice" of the existence of a counterproposal cannot substitute for a new agency notice for other reasons. Section 4 (a) allows an agency to dispense with publication only if *all persons subject to* potential rules have actual notice. "Persons subject thereto" cannot be limited to applicants for a channel involved in the proceeding. "Persons subject thereto" in these proceedings include newspapers, radio stations, civic organizations, and private citizens of the cities whose television service would be affected by the proposed allocation, and national television networks, among others. These allocations rules do not have clearly defined "persons subject thereto", but many persons, whose identity cannot be known in advance, have legitimate interests in rules that may be adopted and should have the opportunity to comment. If the Commission is allowed to decide whether all "persons subject thereto" have actual notice of the counterproposal and then dispense with further notice, it will defeat the purposes of Section 4.

When new persons become subject to a rulemaking proceeding there must be a new notice. This follows inevitably from the requirement in Section 4 (a) that notice of rule making must be published in the Federal Register unless all persons subject to the rule making are named, and either are served or have actual notice. Without a new or further notice the agency has no means of naming the new person subject to the rule making and personally serving him in order to avoid the necessity of publication. The Commission is of the view, as reflected by its reliance on the counter-proposal procedure, that the Channel 9 applicants became persons subject to the rule making when they received the comments suggesting the deletion of Channel 9. At that point, however, as just shown, the Commission was powerless to avoid the issuance of a further notice.

E. The decision is in conflict with Hotch v. United States, decided by the Ninth Circuit.

In *Hotch* v. *United States, supra,* the appellant had been convicted of violating a Department of the Interior fishing regulation. The Ninth Circuit invalidated the conviction and declared the regulation void, holding that since neither the proposed regulation nor the regulation itself were ever published in the Federal Register, it was invalid even as to persons such as the appellant who had actual knowledge of its existence. The Court said, in part:

> "The Administrative Procedure Act and the Federal Register Act are more than mere recording statutes whose function is solely to give constructive notice to persons who do not have actual notice of certain agency rules. [footnote omitted] The Acts set up the procedure which must be followed in order for agency rulings to be given the force of law. Unless the prescribed procedures

> are complied with, the agency (or administrative) rule has not been legally issued, and consequently it is ineffective." (212 F. 2d, at p. 283)

The purport of the *Hotch* decision is that the notice procedures of Section 4 of the APA are jurisdictional in nature and that without careful observance of those procedures the agency's rule is invalid, regardless of what a litigant knows or of what he has notice. Judge Fahy, in his dissent below, stated, in effect, the same point of view:

> "Our review of the merits of Commission decisions is limited. One of the justifications for the limitations falls away if the parties are not afforded a full opportunity to be heard before the Commission itself. It is important, therefore, that the Commission carefully comply with the provisions Congress has provided for notice." (p. 16, Slip Opinion)

Although sought to be distinguished by the majority below (p. 14, Slip Opinion), a clear conflict is presented between the decision of the Ninth Circuit and the decision here complained of in the interpretation of the notice requirements of Section 4, in that the Ninth Circuit requires a strict and literal application of the Section 4 procedures, whereas the majority below authorizes a loose application, if not a complete evasion, of the notice procedures. This conflict between the two circuits on a problem of broad significance warrants review by this Court.

The obligation of an agency to issue a revised notice when the scope of the rule making proceeding is altered, as here, is also reflected by two Tariff Commission cases. In *Schmidt Pritchard & Co. v. United States*, 167 F. Supp. 272 (United States Customs Court, 2d Div., 1958), the appellant challenged a tariff on the ground that it was based on a supplemental in-

quiry which exceeded the scope of the original inquiry and the Commission had failed to give public notice and hold public hearings with respect to the supplemental inquiry. The Court upheld this contention saying:

> "Obviously, the scope of inquiry requested of the Commission [by the President] both in economic research and in point of time exceeded the scope of the original inquiry and the facts which were set forth in the March 14, 1955, report of the Tariff Commission, and should necessitate renewal of the statutory requirements for appropriate proceedings by the Tariff Commission." (167 F. Supp., at p. 272)

Similarly, in *Carl Zeiss, Inc.* v. *United States,* 76 F. 2d 412 (Court of Customs and Patent Appeals, 1935), the court held a report of the Tariff Commission invalid on the ground that the publication of a notice of an investigation as to instruments "used by" the Armed Forces did not suggest to interested persons that the investigation encompassed instruments "suitable to be used by" the Armed Forces.

In the instant case, the suggestion that Channel 9 be deleted involved new questions and required new engineering studies as to loss of service, for the problems are quite different where both Channels 7 and 9 may be deleted than where Channel 7 only may be deleted. Consequently, within the principle of the cases cited, an additional notice was required when the Commission decided to expand the proceeding to involve the possible deletion of Channel 9.

F. The Court of Appeals' decision announces the erroneous principle that deficiencies in an agency's observance of the procedures in Section 4 of the Administrative Procedure Act are corrected by the opportunity to petition for reconsideration.

The majority below held that even if there were substance to the claim by the Channel 9 applicants of lack of earlier notice of the full import of the rule making, the final Report and Order did give them notice, and they could have sought reconsideration under Section 405 of the Act (p. 11, Slip Opinion). This position invites agency disregard of Section 4 and is irreconcilable with the position of the Ninth Circuit that strict observance of the Section 4 procedures is a condition precedent to the adoption of a valid rule.

Moreover, the Channel 9 applicants and all other interested persons had the right to be heard before the final decision and to have their arguments weighed contemporaneously with the comments favoring the deletion of the channel. As this Court has said:

> "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective."

Opp Cotton Mills v. *Administrator*, 312 U.S. 126, 152-3 (1941). The right to a hearing "after the ax [has] fallen" is "a dubious opportunity." *Farmer* v. *United Electrical Radio & Machine Workers*, 93 U.S. App. D.C. 178, 211 F. 2d 36, 40 (1953), cert. den. 347 U.S. 943. Had there been notice that Channel 9 might be deleted in the case and had the persons opposing that plan been afforded the opportunity to file comments, the Commission might have decided not to delete Channel 9. The Channel 9 applicants were not obliged, as

the majority below has concluded, to forget about the loss of their rights to notice, to file comments, to file reply comments, and to have their views considered contemporaneously with the views of persons favoring the deletion of the channel *before* final action.*

G. Conclusion on the Notice Question

The Court of Appeals' decision allows the Commission to issue a limited notice and then let the proceeding take whatever form and shape private litigants want it to take. It allows the Commission to decide for itself whether circumstances are such that a person should have expected that a particular allocations rule might be adopted, regardless of what the Commission said in its notice. It also allows the Commission to adopt counterproposals without further notice, thereby depriving interested persons of an opportunity to comment. If allowed to stand, the decision grants the Commission an exemption from Section 4 of the APA. The decision can be expected to affect every television allocations proceeding.

Because of the importance of the case to the rule-making processes of the Federal Communications Commission and of other government agencies, the Court should grant certiorari.

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* "In the 'rule making' (that is, 'legislative') function it [the APA] provides that with certain exceptions agencies must publish notice and at least permit interested parties to submit their views in writing for agency consideration *before* the issuance of general regulations (sec. 4)." (emphasis supplied) Report of the House of Representatives Committee on the Judiciary, U.S. Code Congressional Service, 79th Congress, Second Session, 1946, p. 1195, at p. 1205.

II. THE DELETION OF CHANNEL 9 WAS PREMISED ON THE OCCURRENCE OF AN IMAGINARY EVENT.

The only ultimate justification for the deletion of Channel 9 is in the Commission's declaration that "The action we are taking will result in the Evansville area becoming an all-UHF market." (J.A., p. 31; par. 27, March 1, 1957 Report and Order). The Commission, however, is powerless to delete VHF Channel 7 at Evansville without first holding an evidentiary hearing under Section 316 of the Communications Act, since the operator of Channel 7 holds a construction permit.

A Section 316 hearing involving Channel 7 is presently in progress. However, unless the question has been improperly prejudged and the requirements of Section 316 are empty rights, whether the Evansville area will become an all-UHF market cannot now be determined. Thus, the Channel 9 applicants are in the anomalous position of losing the channel they sought for three years in a comparative hearing in order that all VHF service would be deleted from the Evansville area, although it cannot be presently determined until the conclusion of the Section 316 hearing whether Channel 7 will, in fact, be deleted from Evansville.

The deletion of Channel 9 was accordingly premature, based on a condition subsequent which may never occur, and which therefore could not properly form the foundation for legal agency action.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that the instant petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13776

OWENSBORO ON THE AIR, INC., and
OWENSBORO PUBLISHING COMPANY, PETITIONERS,

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS,
AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,
INTERVENOR,
MID-AMERICA BROADCASTING CORPORATION, INTERVENOR,
WEHT, INC., INTERVENOR.

No. 13777

OWENSBORO ON THE AIR, INC., and
OWENSBORO PUBLISHING COMPANY, APPELLANTS,

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE,
AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,
INTERVENOR,
MID-AMERICA BROADCASTING CORPORATION, INTERVENOR.

No. 14044

OWENSBORO ON THE AIR, INC., and
OWENSBORO PUBLISHING COMPANY, APPELLANTS,

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE,

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., INTERVENOR,

MID-AMERICA BROADCASTING CORPORATION, INTERVENOR,

WEHT, INC., INTERVENOR.

No. 14046

EVANSVILLE TELEVISION, INC., APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE,

WEHT, INC., INTERVENOR.

No. 14047

EVANSVILLE TELEVISION, INC., PETITIONER,

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS,

WEHT, INC., INTERVENOR.

No. 14049

OWENSBORO ON THE AIR, INC., and
OWENSBORO PUBLISHING COMPANY, PETITIONERS,

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS,

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.
INTERVENOR,

MID-AMERICA BROADCASTING CORPORATION, INTERVENOR,

WEHT, INC., INTERVENOR.

On Petitions for Review and Appeals from Orders of the Federal Communications Commission

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Decided December 18, 1958

Mr. Joseph Zias for Owensboro on the Air, I petitioner in Nos. 13776 and 14049 and appellant in N 3777 and 14044. *Mr. Philip G. Loucks* also entered an appearance for Owensboro on the Air, Inc., petitioner, in No. 13776 and appellant in No. 13777. *Mr. Maurice M. Jansky* also entered an appearance for Owensboro on the Air, Inc., appellant in No. 14044.

Mr. Robert N. Green, with whom *Messrs. Vincent B. Welch, Harold E. Mott* and *Edward P. Morgan* were on the brief, for Evansville Television, Inc., appellant in No. 14046 and petitioner in No. 14047.

Mr. Russell Rowell was on the brief for Owensboro Publishing Company, petitioner in Nos. 13776 and 14049 and

appellant in Nos. 13777 and 14044. *Messrs. Frank U. Fletcher* and *Robert H. Heald* also entered appearances for Owensboro Publishing Company, petitioner in No. 14044.

Mrs. Ruth V. Reel, Counsel, Federal Communications Commission, with whom *Messrs. Warren E. Baker*, General Counsel, Federal Communications Commission, at the time the brief was filed, *Richard A. Solomon*, Assistant General Counsel, Federal Communications Commission, *Richard M. Zwolinski*, Counsel, Federal Communications Commission, and *Daniel M. Friedman*, Attorney, Department of Justice, were on the brief, for appellee-respondents. *Mr. Charles C. McCarter*, Attorney, Federal Communications Commission, also entered an appearance for appellee-respondent Federal Communications Commission in Nos. 14046 and 14047.

Mr. J. Roger Wollenberg, with whom *Mr. Andrew G. Haley* was on the brief, for intervenor Mid-America Broadcasting Corporation in Nos. 13776, 13777, 14044 and 14049.

Messrs. James A. McKenna, Jr., and *Vernon L. Wilkinson* were on the brief for intervenor American Broadcasting-Paramount Theatres, Inc., in Nos. 13776, 13777, 14044 and 14049.

Messrs. Bernard Koteen and *Alan Y. Naftalin* were on the brief for intervenor WEHT, Inc.

Before FAHY, DANAHER and BASTIAN, *Circuit Judges*.

DANAHER, *Circuit Judge*: We are here asked to review another phase of the vexatious UHF-VHF conflict which has long engaged the Commission and which on several occasions has come to this court.[1] This time we are con-

[1] See, e.g., Coastal Bend Television Co. v. Federal Communications Commission, 98 U.S. App. D.C. 251, 234 F. 2d 686 (en banc, 1956); Greylock Broadcasting Company v. United States, 97 U.S.

cerned with Evansville, Indiana, and the area adjacent thereto.

Owensboro on the Air, Inc., and Owensboro Publishing Company had been engaged in adjudicatory proceedings testing their comparative qualifications for an award of VHF Channel 9 in Hatfield, Indiana.[2] The Commission had made no award. These parties will hereinafter be referred to as Owensboro-appellants. Evansville Television, Inc., herein referred to as Evansville-WTVW, is a permittee which, since September 1956, has been operating on VHF Channel 7 in Evansville, Indiana.

Basically, the foregoing parties here contend that the Commission's rule making is technically invalid and thus that the deletion of VHF Channel 9 from Hatfield is illegal. The Commission's notice of proposed rule making in Docket No. 11757 specifically prescribed a contemplated plan to require all commercial television operations emanating from Evansville to utilize UHF channels. It was expressly noticed that VHF Channel 7 at Evansville

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App. D.C. 414, 231 F. 2d 748 (1956); Springfield Television Broadcasting Corp. v. Federal Communications Commission, —— U.S. App. D.C. ——, 259 F. 2d 170 (1958); and WIRL Television Company v. United States, 102 U.S. App. D.C. 341, 253 F. 2d 863 (1958), *cert. granted, judgment vacated on other grounds*, —— U.S. —— (Oct. 20, 1958). By our order, the Clerk of this Court directed all parties in the instant case to inform us as to the possible existence of circumstances such as caused the Supreme Court to vacate our judgment in the WIRL case. We accept the assurances of all parties that there are no such circumstances here present.

[2] VHF Channel 9 was a "drop-in" channel not allocated to Hatfield, Indiana, under the Commission's 1952 Sixth Report and Order but was found thereafter to be permissible under later-evolved engineering limitations. Compare the Vail Mills Channel 10 "drop-in" in Greylock Broadcasting Company v. United States, *supra* note 1, and Van Curler Broadcasting Corp. v. United States, 98 U.S. App. D.C. 432, 236 F. 2d 727 (*en banc*, 1956), *cert. denied*, 352 U.S. 935 (1956).

was to be reserved for educational use, should the proposal be adopted. No construction permit had ever been issued for operation on VHF Chanhel 9 at Hatfield, and the notice of rule making did not mention Channel 9. Accordingly it is argued that the notice was fatally defective because of the Commission's alleged failure to comply with the notice requirements of § 4(a) of the Administrative Procedure Act which reads in pertinent part:

> "Sec. 4(a). Notice.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include . . . (3) either the terms or substance of the proposed rule *or a description of the subjects and issues involved.*" (Emphasis added.)

In *Jacksonville Journal Co.* v. *Federal Commun. Com'n.* 101 U.S.App.D.C. 12, 13, 246 F.2d 699, 700 (1957),[3] we noticed that the Commission's Report and Order in Docket No. 11532 had followed our *Coastal Bend* decision. Therein the Commission had specified certain criteria which were to be deemed generally applicable in dealing with the problem of interim action. The Commission had indicated that a "basic choice" in many markets might require the elimination of VHF channels in order to create improved opportunities for UHF broadcasting. 13 PIKE & FISCHER RADIO REG. 1571, 1581, 1582. On the same day, June 26, 1956, in Docket No. 11757, 21 Fed. Reg. 4972, the Commission gave notice of proposed rule making and specifically called attention to its Report and Order in Docket No. 11532, in accordance with the general objectives of which its interim program of channel reassignments was to be undertaken. The Commission proposed

[3] *Supra* note 1.

that VHF Channel 7 in Evansville be reserved for educational use and that UHF Channel 56 in Evansville be released from educational reservation so that Evansville would have UHF Channels 50, 56 and 62 for commercial use. The same notice of rule making further specified that:

> "Any interested party who is of the view that the proposed amendment should not be adopted, *or should not be adopted in the form set forth herein*, may file with the Commission on or before September 10, 1956, a written statement setting forth his comments." (Emphasis added.)

In addition, parties submitting comments were expressly requested "to direct their attention to the matters discussed in paragraph 31 of the Commission's Report and Order issued today in Docket No. 11532." Thus incorporated by reference in No. 11757 were the criteria spelled out in detail in Docket No. 11532. The Commission explained:

> "Because of the widely varying circumstances in individual markets and the numerous factors which bear on the choice of techniques in any individual community or area, it is not possible to formulate rigid criteria whose perfunctory application to individual cases will automatically indicate the course which would best serve the public interest in each community during the interim period. We have concluded, however, after extensive review of all the proposals which have been submitted to us for the elimination or addition of commercial VHF assignments, that the following considerations will have important bearing on decisions in specific communities or areas."[4] 21 Fed. Reg. 4958, 4962.

Pursuant to the Commission's invitation that comments or counterproposals be submitted, on July 13, 1956, Mid-America Broadcasting Corp., intervenor herein, and permittee of WKLO-TV, Channel 21 at Louisville, Kentucky,

[4] Docket No. 11532, 13 PIKE & FISCHER RADIO REG. 1582.

asked that VHF Channel 7 be allocated to Louisville rather than be retained in Evansville on a reserved basis.[5]

Evansville-WTVW on August 24, 1956, requested withdrawal of the Commission's June 26, 1956, notice of proposed rule making in Docket No. 11757. Evansville-WTVW correctly contended that as permittee of VHF Channel 7 it was entitled to a full evidentiary hearing under § 316 of the Communications Act. The Evansville-WTVW petition was denied by the Commission in a memorandum and order adopted November 28, 1956, released December 3, 1956. The Commission there noted that the "Notice of Proposed Rule Making in Docket No. 11757, to which petitioner objects, is *merely a proposal* which may or may not be adopted in the form proposed. *Only after consideration of the requested comments and any counterproposals that may be submitted* will we be in a position to judge the proposal on its merits, both legal and factual." (Emphasis added.)

Thereupon, under date of December 3, 1956, Mid-America filed its comments and counterproposal that Channel 7 be reallocated to Louisville, that Channel 9 be reallocated or be deleted from Hatfield, Indiana, and that certain UHF channels be allocated to Evansville and Hatfield. The intervenors, Premier Television, Inc., permittee of UHF Station WFIE in Evansville and WEHT, Inc., permittee of UHF Station WEHT at Henderson, Kentucky, also on December 3, 1956, jointly submitted comments urging that the Commission's original proposal be adopted with reference to VHF Channel 7. They specifically further asked that commercial TV channels "in the Evans-

[5] On October 22, 1956, the Commission denied the Mid-America counterproposal and similar proposals submitted by other Kentucky residents. The Commission indicated that such counterproposals would be considered in the Evansville de-intermixture proceeding and accordingly, there was no necessity for amending the Notice of Rule Making or for instituting further rule making to incorporate the Louisville proposal. 21 Fed. Reg. 8196.

ville, Indiana market" be made exclusively UHF. These intervenors additionally urged that VHF Channel 9, allocated at Hatfield, Indiana, "be reserved for educational use in the Hatfield-Owensboro area."

Evansville-WTVW under date of December 28, 1956, filed extensive comments not only with reference to the Commission's proposal but to the comments and counterproposals of WFIE and WEHT. It argued the demerits of the plan to delete both VHF Channels 7 and 9.

The Owensboro-appellants, on the other hand, chose not to argue the merits. Instead, they contented themselves with filing a motion "to strike comments or so-called counterproposals filed in the above-entitled proceeding relating to the removal, reservation for educational purposes, or the deletion of Channel 9 from Hatfield, Indiana." Their pleading discloses their complete awareness of the Commission's proposal and of the counterproposals. They filed no comments nor did they otherwise propose participation in the rule making proceedings. On the contrary, they stood simply on their claim that the Commission must strike all proposals and counterproposals looking to the deletion or change in designation of VHF Channel 9 at Hatfield solely on the ground, as they alleged, that the June 26, 1956, notice of proposed rule making had failed to comply with the requirements of § 4(a) of the Administrative Procedure Act. But they had actual notice both of the proposed rule making and of the "subjects and issues involved," just as § 4(a) requires.

The Commission on March 1, 1957, released its Report and Order:[6] VHF Channel 9 was deleted from Hatfield and assigned to Evansville for use as a noncommercial, education station;—UHF Channel 56 was allocated to Owensboro for commercial telecasting; Evansville-WTVW pursuant to the requirements of § 316 of the Communications Act of 1934[7] was ordered to show cause why VHF

[6] 22 Fed. Reg. 1499.

[7] 47 U.S.C. § 316 (1952).

Channel 7 should not be reallocated to Louisville, and its entitlement to a hearing with reference thereto was recognized; and—at the same time, UHF Channel 31 was allocated to Evansville,[8] there to be available for commercial telecasting by Evansville-WTVW in the event that the Commission should ultimately decide that Channel 7 should be reallocated to Louisville. (Other actions then taken are not here pertinent.)

The Commission noted in its March 1, 1957, "Report and Order":

> "Our June 26, 1956 Notice of Proposed Rule Making stated that the instant proceeding is being conducted in furtherance of our program for improving the opportunities for effective competition among a greater number of stations in specific areas, which program was enunciated in our June 26, 1956 Report and Order in the general television allocations proceeding (Docket No. 11532).[11] Since the need for area deintermixture was treated at some length in the Report and Order, all parties were on notice that the instant proceeding, as well as the other deintermixture proceedings, concern the need for and advisability of area deintermixture. Unquestionably Evansville and Hatfield, being only about 21 miles apart, are in the same general area.[12] The untena-

[11] Both of these June 26, 1956 releases (Notice in this proceeding and the Report and Order in Docket 11532) were duly published in the Federal Register. This constitutes constructive notice of all parties under prevailing statutes.

[12] The record discloses that Station WTVW on Channel 7 in Evansville puts a Grade A signal over Hatfield, and that both of the Hatfield Channel 9 applicants propose to provide Evansville with a Grade A signal."

[8] Compare the WIRL situation, *supra* note 1, where as part of this same 13 community interim program, appellant desired the VHF Channel 8, not the UHF Channel 25 it received.

bility of the Hatfield applicants' motion to strike is further demonstrated by the fact that the WFIE and WEHT counterproposal to delete or reserve for education Channel 9, was included as an integral part of their initial comments in this proceeding, which comments were filed on December 3, 1956. Reply comments were timely if filed by December 28, 1956. The Channel 9 applicants were thus afforded an ample opportunity to submit comments in opposition to this counterproposal. We need not decide whether these Hatfield applicants had constructive notice of the filing of the WFIE and WEHT counterproposal, since they unquestionably had actual notice of this filing some time prior to December 28, 1956. The Hatfield applicants could not otherwise have filed their motion to strike on that date."

The Owensboro-appellants thus again had full opportunity, then and there to act, with detailed knowledge of all aspects of that Report and Order. They were already in the case as parties. Even were it to be granted that there was some substance to their claim of lack of earlier notice of the full import of the contemplated rule making, after their motion to strike had been denied and the Commission's Report and Order had issued on March 1, 1957, they certainly were fully advised in the premises. They could have sought reconsideration under § 405 of the Act.[9] But they chose to take no further steps.

It is clear that the Commission concluded, in its competence, to "de-intermix" the Evansville area and so allocated only UHF channels for telecasting in that market, thus seeking to achieve the objectives spelled out in detail in its Memorandum and Order in Docket No. 11532.[10]

[9] 47 U.S.C. § 405 (1952). The petition for reconsideration filed by Evansville-WTVW was denied by the Commission's Memorandum Opinion and Order released June 24, 1957.

[10] We do not discuss the merits of the position of Evansville-WTVW with reference to the reallocation of VHF Channel 7, because of the pending hearing.

That the Commission in a rule making proceeding may take such action is no longer open to question.[11]

The case, then, comes to this: is an otherwise valid determination by the Commission to be voided for its failure to include in the original proposal a suggestion that its de-intermixture program might require the deletion of VHF Channel 9? We answer in the negative, particularly on the facts of this case. We have no intention whatever of accepting a Commission's plan of convenience as a substitute for compliance with the rule making notice requirements of § 4 of the Administrative Procedure Act. Here, however, there were both the actual notice and a description of the subjects and the issues involved as required by § 4(a), within our holding in *Logansport Broadcasting Corp.* v. *United States, supra* note 11. Section 4(a), we there said, "requires only that the prior notice include 'a description of the subjects and issues involved.' We think the procedure followed by the Commission amply fulfilled this requirement. . . . Surely every time the Commission decided to take account of some additional factor it was not required to start the proceedings all over again. If such were the rule the proceedings might never be terminated." 93 U.S.App.D.C. at 346, 210 F.2d at 28.

There was far more than the concise general statement of the basis and purpose of the amended rules which we approved in *Van Curler Broadcasting Corp.* v. *United States, supra* note 2, required by § 4(b). There was no denial of opportunity to the parties to participate as fully as they chose. To void the Commission's rule making here would be an exercise in sheer stultification. The facts compel a realistic appraisal of the background for the action by the Commission which we now affirm.

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[11] Peoples Broadcasting Co. v. United States, 93 U.S. App. D.C. 78, 209 F. 2d 286 (1953); Zenith Radio Corp. v. Federal Communications Com'n, 93 U.S. App. D.C. 284, 211 F. 2d 629 (1954); Logansport Broadcasting Corp. v. United States, 93 U.S. App. D.C. 342, 210 F. 2d 24 (1954); and see notes 1 and 2 *supra*.

Hatfield, Indiana, is a community of some 2,500 population. It may be supposed no one will contend a listening audience limited to that community can support a television station. Owensboro on the Air, Inc., tells us in its brief that the VHF Channel 9 "drop-in" was the result of its own engineering study. In seeking the allocation, it represented to the Commission that "the assignment of Channel 9 to Hatfield will result in the assignment of a channel to a community to which no assignment now exists and will provide a second channel to serve the needs and interests of Owensboro *and its environs*, thus fostering competition between television stations in the public interest as contemplated by the Communications Act." (Emphasis added.)

Of course that was true. There were only two VHF channels allocated to communities within 75 miles of Evansville. One was VHF Channel 9 and the other was VHF Channel 7. Any action as to reallocation or use which might affect one inevitably would affect the other. Allocations of television channels were not to post office sites but to the area to be served. Owensboro is only 10 miles from Hatfield. Evansville is only 21 miles from Hatfield. The Owensboro-appellants themselves, obviously, sought to serve, not Hatfield as such, but "Owensboro and its environs," and both actually proposed to put a Grade A signal over Evansville. That situation had long since given rise to a series of de-intermixture proposals with reference to this very area. Commencing as early as October, 1954, the juxtaposition of VHF Channels 7 in Evansville and 9 in Owensboro had been the subject of challenge, followed by Commission consideration and rule making.

Finally, on November 10, 1955, the Commission dismissed the various rule making proceedings,[12] and at the

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[12] 13 PIKE & FISCHER RADIO REG. 1511; 20 Fed. Reg. 8495 where it will be seen, appellants-petitioners here with various of the in-

same time initiated the new rule making proceeding, Docket No. 11532, *supra*. The Commission's action was then attacked in this court with the appeals consolidated under the caption of *Coastal Bend Television Co.* v. *Federal Communications Commission*, *supra* note 1. There we sustained the Commission. We did so again in *Gerico Investment Co.* v. *Federal Commun. Com'n*, 99 U.S.App.D.C. 379, 240 F.2d 410, on January 17, 1957. All of these actions antedated the Commission's June 26, 1956, Report and Order in Docket No. 11532 and its initiation the same day of Docket No. 11757, here involved. We need not repeat but merely refer to the steps which followed, narrated above. If the purpose of notice when required in any case is to *give notice*, the appellants-petitioners here had it.[13] There is no showing that they were deprived of opportunity in any measure to take whatever steps their own situation might suggest, whether by way of counterproposal and comment or by evidence to establish their own position. That they are not happy over the result is clear. That they sustained legal injury is not.

Affirmed.

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tervenors had been parties to rule making proceedings in Docket No. 11334 involving these very channels and, in substance, the same proposals and counterproposals.

[13] It has been urged that Hotch v. United States, 212 F. 2d 280 (9 Cir. 1954), should control here. There the court was not concerned with the sufficiency of a notice of rule making which had been published in the Federal Register, as happened in this case. On the contrary the court pointed out "that since neither the proposed regulation nor the regulation itself . . . were ever published, the regulation is not valid . . . ." *Id.* at 284. Thus the failure to publish as a prerequisite to the issuance of a regulation making certain acts criminal was held to preclude a conviction. Clearly no such situation exists in the instant case.

FAHY, *Circuit Judge, dissenting:* The Administrative Procedure Act[1] provides two important safeguards for the protection of private rights in agency rule making by requiring, first, that there shall be publication of notice of proposed rule making, and secondly, that there shall be opportunity for participation by interested persons.

Section 4(a) provides that notice of proposed rule making shall be published in the Federal Register and must include, among other things, "either the terms or substance of the proposed rule or a description of the subjects and issues involved." Section 4(b) provides that after notice has been issued, "the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner. . . ." In rule making proceedings the provisions as to notice and public participation must be read together.

Considering the requirements of § 4(a), I am unable to construe the notice which was released by the Commission on June 26, 1956, as adequate to support the order of the Commission. The notice is entitled "Amendment of Section 3.606, Table of Assignments, Television Broadcast Stations (Evansville, Indiana)"; its first paragraph states that "Notice is hereby given of rule making in the above-entitled matter." The notice goes on in the second paragraph to announce that the Commission proposes changes in certain existing and named channels—some are to remain in Evansville while others will be reassigned elsewhere as specified. Neither Hatfield, Indiana, nor channel 9 then assigned to Hatfield, is mentioned anywhere in the notice; yet the Commission has ordered that the Table of Assignments contained in Section 3.606 of its Rules and Regulations be amended to delete VHF television channel 9 from Hatfield, and to reassign it to Evansville for

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[1] 60 Stat. 237, 5 U.S.C. §§ 1001-11 (1952).

educational purposes. The legislative history of the Administrative Procedure Act makes clear that the notice issued by the agency in compliance with the mandate of § 4(a) "must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto," and that "where notice is required, it should be complete and specific."[2]

My view I think is fortified by the fact that channel 9 was sought to be brought into the Evansville proceedings by a counter-proposal. This counter-proposal, however, was objected to and the Commission delayed ruling on the objection until it was overruled simultaneously with the order eliminating channel 9 from Hatfield. If the Commission was to eliminate channel 9 it should have ruled on the objection to its involvement in the Evansville proceedings before actually deleting it from Hatfield.

Our review of the merits of Commission decisions is limited. One of the justifications for the limitation falls away if the parties are not afforded a full opportunity to be heard before the Commission itself. It is important therefore, that the Commission carefully comply with the provisions Congress has provided for notice.

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[2] S. Doc. No. 248, 79th Cong., 2d Sess. 200 (1946).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1958

No. 14,046

EVANSVILLE TELEVISION, INC., *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,

MID-AMERICA BROADCASTING CORPORATION, *Intervenor*, [sic]

WEHT, INC., *Intervenor*.

No. 14,047

EVANSVILLE TELEVISION, INC., *Petitioner*,

v.

UNITED STATES OF AMERICA,

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*,

WEHT, INC., *Intervenor*.

Before: PRETTYMAN, *Chief Judge*, EDGERTON, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, *Circuit Judges in Chambers*.

Order

Upon consideration of the petition for rehearing in banc, it is

ORDERED by the court that the petition for rehearing in banc is denied.

Per Curiam.

Dated: February 2, 1959

Circuit Judge Miller did not participate in this order.

APPENDIX C

1958 Report of the Committee on Communications of the Administrative Law Section, American Bar Association*

Preface

The Communications Committee of the Administrative Law Section undertook this year to consider and report on the following subjects:

* * *

2. The procedure governing the filing and consideration of counter-proposals in response to rule making proposals of the Federal Communications Commission.

* * *

In the report, infra, on each subject, there are presented a statement of the problem, discussion, and the recommendations of the Committee.

* * *

II

The procedure governing the filing and consideration of counter-proposals in response to rule making proposals of the Federal Communications Commission.

Statement of the problem. With stated exceptions, Section 4 of the Administrative Procedure Act requires agencies to publish general notices of proposed rule making in the Federal Register containing, among other things, the terms or substance of the proposed rule or a description of the subjects and issues involved. The Federal Communications Commission, while publishing notices of proposed rule making in the Federal Register and describing the substance of proposed rules, has followed the practice of receiving and considering counter-proposals contained in comments filed in answer to notices of proposed rule making, even though the counter-proposals suggested entirely new solutions to the problems involved in the proceedings. Such counter-proposals are not published

* Reprinted in 1958 Federal Communications Bar Journal.

in the Federal Register, nor is there any Commission requirement that they be served on other parties interested in the proceedings. The question arises, therefore, whether Commission consideration of counter-proposals not within the ambit of the original notices of proposed rule making is contrary to the letter and spirit of Section 4 of the APA.

Discussion. The Attorney General's Manual on the Administrative Procedure Act (1947) states the purpose of Section 4 as follows:

> "In general, the purpose of Section 4 is to guarantee to the public an opportunity to participate in the rule making process. With stated exceptions, each agency will be required under this section to give public notice of substantive rules which it proposes to adopt, and to grant interested persons an opportunity to present their views to it." (p. 26)

Since notice to the public is the paramount concern of Section 4 of the APA, it is necessary to examine the practice of the Commission with respect to giving notice of counter-proposals in rule making proceedings to determine the validity of the consideration regularly given to such counter-proposals.

Persons desiring the Commission to adopt new rules, or to amend existing ones, file petitions for rule making setting forth the nature of the proposed rules or amendments and the reasons why they should be adopted. There is no requirement that the petitions be served on anyone. However, public notice of the filing of such petitions is announced by the Commission in a press release, and diligent parties this way learn of such petitions and have an opportunity to oppose or support them if they so desire. Any statements supporting or opposing petitions to institute rule making proceedings must be served on the petitioners. (Rule 1.204.) If the Commission is convinced that there is sufficient substance to the petitions, it issues formal notices of proposed rule making which are published in the Federal Register. Time limitations are set

for the filing of written comments and reply comments. The average time for filing comments and reply comments is 30 days and 15 days respecfively. There is no Commission requirement that comments or reply comments be served on interested parties since it is difficult to ascertain all of the parties who might have an interest in the rule making proceedings.

Parties opposed to the adoption of proposed rules often go further than merely explaining why they should not be adopted. They frequently offer variant solutions to the underlying problems which bring in new issues not within the ambit of the original notices of proposed rule making. For example, the Commission recently issued a notice of proposed rule making raising the question whether television channel 3 should be allocated to Ainsworth, Nebraska. (Television channels are allocated geographically by rule making.) An existing station on channel 3 at Omaha, Nebraska opposed the suggested allocation, and also petitioned the Commission to issue a supplemental notice of proposed rule making to allocate channel 7 to Ainsworth rather than channel 3. By order released November 6, 1956 (21 F.R. 8821), the Commission held squarely that the counterproposal to allocate channel 7 rather than channel 3 to Ainsworth need not be the subject of further public notice by amendment of the notice of proposed rule making, but that the merits of the counter-proposal would receive full consideration in the proceeding. A channel 7 station in Omaha, which had no interest in the rule making proceeding affecting channel 3 but had a definite interest in the issue presented by the counter-proposal with respect to channel 7, did not receive service of the counter-proposal, was not notified of the counter-proposal by the Commission directly through press release or otherwise, and did not have constructive notice through amendment of the original notice of proposed rule making to encompass the enlarged issue. (Fortuitously, the channel 7 station at Omaha had actual notice. See Report and Order, Docket 11830, 15 Pike & Fischer, Radio Regulation, 1617, 1620).

In the Evansville deintermixture case (Docket No. 11,757, 15 Pike & Fischer, RR 1573), the Commission issued a notice of proposed rule making which was published in the Federal Register suggesting that Channel 7 at Evansville be changed from a commercial to a noncommercial educational channel. Comments were filed pro and con the suggested amendment. Some of the comments proposed that in lieu of changing Channel 7 to a noncommercial status, the channel should be reallocated to Louisville, Kentucky. Other comments recommended that complete deintermixture in the Evansville area be effectuated by deleting Channel 9 from nearby Hatfield, Indiana, and reserving the channel for educational use at Evansville. Neither of these counter-proposals was ever published in the Federal Register. However, the proposals involved had been the subject of previous rule making proceedings. The Commission adopted both counter-proposals. The question whether such action complies with Section 4 of the Administrative Procedure Act is now pending on appeal in the United States Court of Appeals for the District of Columbia Circuit (Owensboro on the Air, Inc., et al. v. United States of America, et al., Nos. 13,776, et al.).

In view of the fact that Section 4 of the APA strives to insure public notice of the substance of administrative rule making (with the exceptions listed in the Act), it seems clear to this Committee that the general purpose and meaning of Section 4 is vitiated by the failure of the Commission to provide notice of counter-proposals by means of publication in the Federal Register or other procedures sanctioned by Section 4. The Committee is aware of the practical difficulties in this matter pointed out by the Commission in its Report and Order in the Ainsworth, Nebraska proceeding, referred to above:

> "Rule making proceedings could go on interminably if an administrative agency such as this Commission should be required, wherever a meritorious counter-proposal is advanced in comments, to issue a Further Notice of Proposed Rule Making and to extend the time for filing comments for a reasonable period after

issuance of the further notice." (15 Pike & Fischer, RR 1620).

However, the possibility of interminable protraction of rule making proceedings is not in itself justification for not abiding by the requirements of the Administrative Procedure Act rather than providing a procedural technique which would both permit compliance with the APA and serve administrative convenience. It also appears that there is substantial basis for thinking that the acute problem confronting the Commission in the allocation of television channels by rule making, rather than upon applications therefor, is not typical of the administrative rule making process.

Recommendation. The Committee has given consideration to techniques of notice which would both satisfy the notice requirements of Section 4 of the APA but avoid excessive delay in rule making proceedings of the Federal Communications Commission, especially with regard to television channel allocation rule making, but has not agreed upon any one of several alternatives suggested. It is recommended that the effort to reach agreement on a notice procedure consistent with Section 4 of the APA and with administrative convenience be continued by the new Committee.

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MAY 29 1959
JAMES R. BROWNING, Clerk

No. 885

IN THE

Supreme Court of the United States

October Term, 1958

OWENSBORO ON THE AIR, INC., and OWENSBORO PUBLISHING COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Brief for
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In Opposition

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IN THE

Supreme Court of the United States

October Term, 1958

No. 885

OWENSBORO ON THE AIR, INC., and OWENSBORO PUBLISHING COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Brief for

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.

In Opposition

OPINIONS BELOW

The opinion of the court below (Pet. App. 1a-16a) is reported at 262 F.2d 702. The underlying reports and orders of the Federal Communications Commission (R. 755-770, 919-923) are reported at 22 FCC 382 (1957) and 23 FCC 49 (1957).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the action

of the Commission, was entered on December 18, 1958 (Pet. App. 17a). Rehearing *en banc* was denied February 2, 1959 (Pet. App. 17a). The petition for a writ of certiorari was filed on May 1, 1959. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether the notice of proposed rule making pursuant to which the Commission subsequently "deintermixed" the Evansville-Hatfield (Ind.) area satisfied the notice requirements of Section 4 of the Administrative Procedure Act (5 U.S.C. Sec. 1003).

STATUTE INVOLVED

The pertinent provisions of Section 4 of the Administrative Procedure Act (5 U.S.C. Sec. 1003) are set forth in petitioners' brief (p. 3).

STATEMENT

In television, unlike standard (AM) broadcasting, the only channels which an applicant may apply for in a given community are those specifically allocated to that community by the Commission's nationwide table of television assignments (1 Pike and Fischer, *Radio Regulation* 53:606).[1] Changes in that table are effectuated through rule-making proceedings (1 RR 53:607(a), 610). However, a channel allocated to a given city is also usable in other communities within 15 miles thereof to which no channel has been specifically allocated (1 RR 53:607 (b)). Furthermore, so long as transmitter separation requirements are met and a "city-grade" signal is placed over the city to which the channel is allocated, an applicant has considerable latitude in specifying a transmitter site—frequently as much as 30 miles or more from

[1] Hereinafter cited as —— RR ——.

the city to which the channel is actually allocated (1 RR 53:610, 685).

Immediately prior to the changes here challenged, the following very high frequency (VHF) channels were listed in the Commission's table for the areas here involved: VHF Channel 7, Evansville, Ind.; VHF Channel 9, Hatfield, Ind. (a small town of fewer than 2500 persons 21 miles from Evansville); and VHF Channels 6 and 11, Louisville, Ky. Additional ultra high frequency (UHF) channels had also been allocated to Evansville and Louisville—at a time when the Commission was proceeding on the then justified (but since disproved) assumption that the intermixture of VHF and UHF channels in the same markets and the same general areas would result in the manufacture of nothing but all-channel receivers and that UHF channels would thus become in due course "an integral part of a *single*, nationwide television service."[1]

With VHF Channels 7 and 9 "tied up" in comparative hearings, two stations began operating in late 1953 on the UHF channels which had been allocated to Evansville. However, a UHF station in Louisville which went on the air about the same time, confronted as it was with competition from two prefreeze VHF stations, was forced to suspend operations in the spring of 1954. The Evansville UHF stations, fearing a similar fate when the Channel 7 hearing was resolved, petitioned the Commission to "deintermix" Evansville by reserving Channel 7 for educational use. In turning down that request in January 1955, the Commission called attention to the fact that the relief thus sought would not effectively deintermix the Evansville area because Channel 9 would still be allocated to Hatfield, only 21 miles away (11 RR 909, 911).

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[1] Sixth Report of April 14, 1952, 1 RR Pt. III, p. 91:664.

Profiting from this ruling the Evansville UHF stations broadened their petition to include the removal of both Channels 7 and 9 (see R. 295-328). Pursuant to this request, and as one of five so-called "pilot" deintermixture proceedings, the Commission on March 31, 1955 instituted rule-making proceedings looking toward the non-utilization of Channels 7 and 9 for commercial purposes in the Evansville area (20 Fed. Reg. 2197). However, in November 1955, on the premise that the intermixture concept had been "basic" to its 1952 allocation table and that the problem was one which should not be handled on a piecemeal basis, the Commission dismissed the five so-called "pilot" proceedings "without prejudice", and concurrently therewith instituted a general rule-making proceeding to consider allocations on an over-all basis. 13 RR 1541; 13 RR 1522; 20 Fed. Reg. 8501 (Docket No. 11532).

On June 26, 1956 the Commission issued a Report and Order, on the basis of data submitted in its over-all proceeding (Docket No. 11532), in which it concluded that its original intermixture policy was "a failure"[1]; that UHF stations could not survive in *areas* receiving a Grade A service from two or more VHF stations; that the mistaken intermixture policy should be corrected in two ways—by a possible long-range shift of all television to UHF and by the deletion (as an interim measure) of VHF channels in areas where UHF had obtained a foothold, and by utilizing those deleted VHF channels in areas which were already predominantly VHF (*Second Report on Deintermixture*, 13 RR 1571).

Concurrently therewith the Commission on its own motion reinstituted its five "pilot" (and eight other) proceedings looking toward allocation shifts designed to improve the opportunities for effective competition in

[1] See *Jacksonville Journal Co.* v. *Federal Communications Commission*, 101 U.S. App. D.C. 12, 13, 246 F.2d 699 (1957).

various markets, including Evansville (Docket No. 11757).[1] In its Notice relating to Evansville, the Commission stated that rule making (to reserve Channel 7 in Evansville for educational use and to substitute a UHF channel therefor) was proposed "in accordance with the general objectives" outlined in the June 26, 1956 Report and Order (13 RR 1571), and invited comments from interested persons who supported or opposed the proposal, including those who believed the proposed amendment "should not be adopted in the form set forth herein" (R. 1).

In Comments filed December 3, 1956 the Evansville UHF stations (as in 1955) asked that neither 7 nor 9 be allocated for commercial use in the Evansville-Hatfield area (R. 295-328). The defunct UHF station in Louisville went one step further as it likewise did in 1955—it asked that Channel 7 be shifted to Louisville. In a pleading filed December 28, 1956, the date specified for reply comments, petitioners, who were still involved in a hearing to determine to whom Channel 9 should be awarded, moved to strike all proposals dealing with Channel 9 (R. 474-476).

In a Report and Order released March 1, 1957 (R. 755-770) the Commission decided to deintermix the Evansville-Louisville areas—by instituting a show-cause proceeding to shift Channel 7 from Evansville to Louisville, by substituting a UHF assignment therefor in Evansville, and by shifting Channel 9 from Hatfield to Evansville and reserving it for educational use.[2]

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[1] The results reached by the Commission in several of these several deintermixture proceedings, instituted by Notices of June 26, 1956 and concluded by Reports released March 1, 1957 (concurrently with Evansville) have been before this Court on certiorari during the October 1958 term (Nos. 235, 242, 516, and 517; see also No. 889).

[2] Having adopted in the interim a transmitter-to-transmitter rather than post-office-to-post-office rule, Channel 9 could be al-

Petitioners sought review in the court below, raising a single question—whether the Commission's notice of June 26, 1956 (R. 1-2) was adequate to warrant the changes which it adopted March 1, 1957.[1] American Broadcasting-Paramount Theatres, Inc. (ABC), as a television network interested in three or more equally competitive facilities in as many markets as possible, actively participated in the foregoing proceedings looking toward the deintermixture of the Evansville area to all-UHF and the Louisville area to all-VHF (R. 756). It intervened in the court below pursuant to 47 U.S.C. Sec. 402(c) and 5 U.S.C. Sec. 1038.

ARGUMENT

1. ABC is in full agreement with petitioners that "notice" of intention to change a specific channel assignment in one city would not ordinarily permit the Commission to make shifts of channel assignments in other cities. However, in view of the over-all expressed purpose of the instant proceeding and its involved antecedents, ABC is of the view that petitioners had notice (actual and formal) of the possible ramifications of the June 26, 1956 rule-making proposal and were in no way

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located to Evansville itself, without using the 1953 subterfuge of allocating it to the nearby town of Hatfield (see 13 RR 1571, 1582, para. 32).

[1] The licensee of Channel 7 in Evansville (the petitioner before this Court in No. 889) raised the same (and additional) questions in a petition for reconsideration. In rejecting that petition the Commission, after making reference to the numerous proposals and counterproposals which had been submitted in the various proceedings to deintermix the Evansville area, concluded that all interested persons had had adequate notice (actual and formal) of the possible ramifications of the Evansville proceeding, and that resulting changes were in the public interest (R. 919-923). Following this action, the ungranted applicants for Channel 9 in Hatfield filed new appeals in the court below, again limited to the notice question.

prejudiced or misled by the form of the notice there given.

Evansville and Hatfield are only 21 miles apart (R. 758, para. 9). In 1950 Evansville had a population of 128,636 and Hatfield a population of fewer than 2500 persons. In its 1952 allocation table, since no channels were assigned to Hatfield, it is apparent that the Commission expected this small community to be served by the channels allocated to nearby cities (Owensboro, Ky. and Evansville, Ind.). Upon subsequently learning in 1953 that Channel 9 could be "dropped into" Hatfield, but not into Evansville or Owensboro because of then prevailing post-office-to-post-office (rather than transmitter-to-transmitter) separation requirements, Hatfield became the accidental recipient of a VHF assignment, an allocation which the Commission knew would provide a second VHF signal "in the [Owensboro-Evansville] area" (9 RR 963, 964; see also 11 RR 909, 911; cf. R. 755-756, para. 28). Each of the petitioners, with their roots in Owensboro, filed separate applications for this so-called "Hatfield" channel—which they knew would serve out a distance of 50-70 miles (and hence cover the populous Owensboro-Evansville area).

With allocations in this posture, the Commission in January 1955 denied a petition by the Evansville UHF stations to reserve Channel 7 for educational use, by noting that the relief thus sought would *not* effectively deintermix Evansville because Channel 9 would still be allocated to Hatfield (11 RR 909, 911). The Evansville UHF stations thereupon asked that both 7 and 9 be deleted; comments were invited thereon by notice issued March 31, 1955; petitioners duly participated therein (see 13 RR 1511, 1513). Following the dismissal "without prejudice" of this proceeding and the institution of an over-all allocation proceeding (Docket No. 11532), the Commission concluded by Report and Order released

June 26, 1956 (13 RR 1571) to utilize "deintermixture" on an interim basis—where such action would "improve the opportunities for effective competition among a greater number of stations" (13 RR 1571, 1581, para. 31). From the criteria listed in paragraph 31 of that Report (cf. R. 757-758), it was apparent that whether a given city should be deintermixed was an "area" matter—whether areas (naturally well beyond the city involved) "would lack service" if the wider-coverage VHF channels were deleted; whether UHF stations were operating "in the area", whether the existence of VHF channels in nearby communities would leave the *area* still intermixed, etc. (13 RR 1571, 1582; R. 757, para. 8).

On its own motion, concurrently with the issuance of its June 26, 1956 Report and Order, the Commission reinstated the five "pilot" and eight other proceedings, including Evansville (R. 1). The Notice pertaining to Evansville, in listing the channel changes which the Commission proposed, indicated that Channel 7 in Evansville would be reserved for educational purposes and that a UHF channel would be substituted therefor (R. 1-2). However, the Notice further stated that it was being issued "in accordance with the general objectives" outlined in the June 26 Report and Order and requested all persons who filed comments "to direct their attention to matters discussed in paragraph 31" of that Report—a clear indication that the basic matter in issue was whether the Evansville *area* (i.e., Evansville, Hatfield, and their environs) should be deintermixed (R. 1). As heretofore noted, the Commission had been on record since January 1955 that the removal of Channel 7 from Evansville (without taking comparable action with respect to Channel 9 allocated to the nearby town of Hatfield) would not effectively deintermix the Evansville market (11 RR 909, 911). The Notice further stated that the Commission would consider comments from interested persons who were of the view that deintermixture should

not be effectuated by adopting changes in the Table "in the form" suggested by the Commission therein (R. 1).

Furthermore, following a formal petition by Mid-America that Channel 7 be shifted to Louisville to improve the competitive situation in that market and that the June 26 Notice be amended accordingly (R. 4), the Commission by action formally published in the *Federal Register* on October 25, 1956 (21 Fed. Reg. 8196) let it be known that interested persons in the Evansville and in the other 12 proceedings would be permitted to present *related* alternatives in comments due to be filed on December 3, and that such proposals would be duly considered by the Commission in arriving at a final determination (R. 211).

In line with that duly published pronouncement, persons interested in the Evansville proceeding (in comments filed December 3, 1956) came forward with a number of related proposals. The UHF stations in Evansville renewed their 1955 request that the area be deintermixed by deleting (from commercial use) both Channels 7 and 9 (R. 295-328). Mid-America likewise proposed that Channel 9 be deleted from Hatfield (R. 274), along with the shift of Channel 7 from Evansville to Louisville (R. 245-294). Petitioners must be presumed to have had knowledge of the June 26 Notice and of the October 25, 1956 action, since both were duly published in the *Federal Register*. That petitioners had actual notice of these proposals is apparent from their motions to strike all comments dealing with Channel 9 (R. 474-476). Had they in fact been taken by surprise, they could have requested leave to file additional comments (R. 1). Following the adverse Report and Order of March 1, 1957, they could have sought reconsideration (47 U.S.C. Sec. 405), as did the petitioner in No. 889.

Thus, we submit that petitioners had both formal and actual notice of the possible ramifications of the Com-

mission's proposal to deintermix Evansville, and a full opportunity to rebut the various related suggestions which other persons advanced and which the Commission in substance adopted (Cf. R. 766, para. 28). The June 26 Notice (R. 1), making express reference to the Report and Order released the same day in Docket No. 11532 (13 RR 1571), adequately made known the "subjects and issues involved," thereby complying with the requirements of Section 4 of the Administrative Procedure Act (5 U.S.C. Sec. 1003). Concededly, the Notice in the Evansville proceeding could have been more explicit. But from the references there made to its general Report and Order of the same date in Docket No. 11532 (13 RR 1571), and particularly paragraph 31 thereof (13 RR 1571, 1581, R. 1, cf. R. 757), petitioners who had been following earlier proceedings affecting the Evansville area (13 RR 1511, 1513) could not have but known that the so-called Hatfield channel (Channel 9) was inextricably intertwined with any "deintermixture" of Evansville.

In short, notwithstanding petitioners' contrary assertions (Pet. p. 9), the decision below is not of "broad significance." It turned on the adequacy of a particular Notice issued in a case with peculiar and lengthy antecedents. The situation is one not likely to recur.

2. With due deference to petitioners (Pet. p. 9) the decision below is not in conflict with *Hotch* v. *United States*, 212 F.2d 280 (C.A. 9, 1954). As the court below pointed out (Pet. App. 14a), that case involved the validity of regulations adopted in a proceeding where (unlike here) no notice of any kind was published in the *Federal Register*.

CONCLUSION

The decision below is correct, no important issue calling for further review by this Court is presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 29, 1959

FILE COPY

Nos. 885 and 889

In the Supreme Court of the United States

OCTOBER TERM, 1958

OWENSBORO ON THE AIR, INC., AND OWENSBORO PUBLISHING COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

DOUGLAS H. McDONALD, TRUSTEE, PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

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BRIEF FOR THE UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pets. O. & M. App. 1a)[1] is reported at 262 F. 2d 702. The decision and

[1] References to the petition in Case No. 885 are designated "Pet. O" and to the petition in Case No. 889 as "Pet. M."

order of the Federal Communications Commission is reported at 22 F.C.C. 382, and its decision denying reconsideration is reported at 23 F.C.C. 49.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the actions of the Commission, was entered on December 18, 1958. Rehearing was denied on February 2, 1959. The petition for a writ of certiorari in No. 885 was filed on May 1, 1959; in No. 889 on May 4, 1959. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 5 U.S.C. 1040.

QUESTION PRESENTED

Whether the court below properly determined that the Notice of Proposed Rule Making published in this proceeding was sufficient, under Section 4 of the Administrative Procedure Act, to support the order of the Commission reallocating television Channel 9 from commercial use in Hatfield, Indiana, to non-commercial educational use in Evansville, Indiana.

STATUTE INVOLVED

The pertinent provisions of the Administrative Procedure Act (60 Stat. 238, 5 U.S.C. 1003) are set forth in the petitions at p. 3.

STATEMENT

These cases involve separate petitions to review a rule-making action of the Federal Communications Commission switching VHF Television Channel 9 from Hatfield, Indiana, to Evansville, Indiana. No. 885 is brought jointly by Owensboro On the Air, Inc., and Owensboro Publishing Company ("Owensboro"), competing applicants for a commercial television sta-

tion on the Hatfield Channel 9 assignment. No. 889 is brought by Douglas H. McDonald, Trustee for Evansville Television, Inc., permittee of a television station on Channel 7 in Evansville, for whom McDonald was substituted as a party by order of the Court of Appeals dated April 21, 1959. Since this petitioner, throughout both the proceedings before the Commission and in the court below, went by its former name, it is referred to herein as "Evansville TV."

On March 1, 1957, the Federal Communications Commission, after full rule-making proceedings, amended Section 3.606(b) of its Rules (47 C.F.R. 3.606(b)), comprising a nationwide allocation of television channels, by transferring very high frequency (VHF) Channel 9 from commercial use in Hatfield, Indiana, to non-commercial, educational use in Evansville, Indiana; removing the educational reservation on ultra high frequency (UHF) Channel 56 and transferring it from Evansville to Owensboro, Kentucky (to serve Hatfield as well); and substituting Channel 78 for UHF Channel 31 in Tell City, Indiana (J.A. 15–37,[2] 22 F.C.C. 382, 22 F.R. 1499). The Commission also determined that it would serve the public interest to shift VHF Channel 7 from Evansville to Louisville, Kentucky, and to substitute UHF Channel 31 in Evansville (J.A. 34). However, since Evansville TV is an outstanding permittee on Channel 7 in Evansville, the Commission did not make the latter reallocations final but instead ordered Evansville TV to show

[2] References to the printed Joint Appendix below are designated "J.A."; those portions of the administrative record filed with the Court but not printed are designated "R."

cause, pursuant to Sections 303(f) and 316 of the Communications Act of 1934, as amended (47 U.S.C. 303(f) and 316), why its permit should not be modified to specify operation on UHF Channel in lieu of VHF Channel 7 (J.A. 34).

The instant reallocation actions were among a series of "deintermixture" proceedings undertaken by the Commission in an effort to improve opportunities for effective competition among a greater number of stations in individual areas pending some long-range solution to the nationwide UHF–VHF problem. See Report and Order in Docket 11532, June 26, 1956 (21 F.R. 4958).[3] The Commission here determined that the public interest would be served by making the Evansville area all UHF upon the basis of findings that (1) Channel 7 in Evansville and Channel 9 in neighboring Hatfield were the only VHF channels allocated within 75 miles of Evansville, (2) two UHF stations were already in operation in the Evansville area, (3) the terrain is favorable for UHF opera-

[3] See also *Springfield Television Broadcasting Corp.* v. *United States*, 259 F. 2d 170 (C.A.D.C.), certiorari denied, 358 U.S. 930; *Winnebago Television Corp.* v. *United States*, 258 F. 2d 163 (C.A.D.C.), certiorari denied, 358 U.S. 930; *WIRL* v. *United States*, 253 F. 2d 863 (C.A.D.C.), certiorari granted, remanded on other grounds, 358 U.S. 51; *Sangamon Valley Corp.* v. *United States*, 255 F. 2d 191 (C.A.D.C.), certiorari granted, remanded on other grounds, 358 U.S. 49. The circumstances which led this Court to grant certiorari and remand in the *WIRL* and *Sangamon* cases are not present in the instant case. The court below directed the parties to inform it as to the possible existence of circumstances such as caused this Court to remand in the *WIRL* case. All the parties assured the court below that there are no such circumstances here present. (Pet O. App., 5a).

tions, (4) a high percentage of television sets in the area has been converted for UHF reception, and (5) no significant number of people would lack television service if additional UHF channels were substituted for the commercial VHF channels in the Evansville area, and such loss as might occur would in large part be offset by the population which would gain a first service through the reassignment of Channel 7 to the predominantly VHF Louisville, Kentucky area (J.A. 26–29). The Commission concluded, upon the basis of its experience in other markets, that deletion of the two commercial VHF channels would improve the opportunity for effective competition among a greater number of television stations in the Evansville area, and that the transfer of Channel 7 to Louisville would similarly benefit that area (J.A. 29).

The Commission rejected contentions by petitioners that the Channel 9 move was beyond the scope of the rule making proceeding under Section 4 of the Administrative Procedure Act, because the Notice of Proposed Rule Making contained no express reference to that channel (J.A. 31–33). The Notice (June 26, 1956) proposed to deintermix Evansville by reserving Channel 7 for educational use and removing the educational reservation on Channel 56 (J.A. 1–2, 21 F.R. 4972).[4] It further specified (*ibid.*):

[4] In a Public Notice released simultaneously, the Commission stated that it was proposing to make "Evansville all commercial operation UHF by making only present VHF channel 7 educational instead of commercial and removing present educational reservation from 56, thus giving Evansville Channels 50, 56, and 62 for commercial use" (F.C.C. Public Notice 33663, Report No. 2875). The Public Notice on its face

> Any interested party who is of the view that the proposed amendment should not be adopted, or *should not be adopted in the form set forth herein,* may file with the Commission on or before September 10, 1956, a written statement setting forth his comments. * * * [Emphasis added.]

The Notice also referred (21 F.R. 4973) to the Commission's Report and Order in Docket No. 11532 (*supra*), and specifically directed the attention of parties submitting comments to the matters discussed in paragraph 31 of that Report (21 F.R. 4958, 4962).[5]

Among the parties filing public comments or counterproposals were Premier Television, Inc. (permittee of a UHF station in Evansville), WEHT, Inc. (permittee of a UHF station in nearby Henderson, Kentucky), and Mid-America Broadcasting Corporation (permittee of a UHF station in Louisville, Kentucky). Premier and WEHT urged that the "Evansville, Indiana, market" be made exclusively UHF by

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refers to the fact that Channel 7 was the "only present VHF channel" in Evansville and, contrary to the suggestion of petitioners Owensboro (Pet. O. 4), does not state that only Channel 7 was involved in the proceeding.

[5] In paragraph 31 of Report and Order in Docket No. 11532, the Commission stated with respect to interim action that "a basic choice in many markets at this time lies between the elimination of VHF channel assignments to create improved opportunities for UHF broadcasting and, alternatively, the assignment of additional local VHF channels" (21 F.R. 4958, 4962). While pointing out that it was not possible to formulate any rigid formula because of the "widely varying circumstances in individual markets and the numerous factors which bear on the choice of techniques in any individual community or area," the Commission set forth general criteria which would be considered (*ibid.*).

reserving Channel 9, as well as Channel 7, for educational use in the Hatfield-Evansville area (J.A. 11, R. 297). Mid-America proposed that Channel 7 be reallocated to Louisville, that Channel 9 be reallocated or deleted from Hatfield, and that additional UHF channels be allocated to Evansville and Hatfield (J.A. 9–10).*

On July 13, 1956, subsequent to the Notice of Proposed Rule Making in the instant proceeding, Mid-America filed a Petition for Rule Making in the Nature of Counterproposals to the Commission's Proposal, requesting that Channel 7 be deleted from Evansville and reassigned to Louisville (J.A. 3). The Commission, on October 22, 1956, denied this petition asserting that Mid-America's proposals would be considered as counterproposals in the pending Evansville deintermixture proceeding, and that it did not believe

* Each of these parties had previously made similar proposals in pleadings filed with the Commission. In 1954, Premier and Ohio Valley Television Company (the corporate predecessor of WEHT) requested rule making to reserve Channel 7 for educational use. The Commission denied their petitions on the ground, *inter alia*, that reservation of Channel 7 for educational use would not effectively deintermix the Evansville area in view of the Channel 9 assignment 21 miles away (11 Pike & Fischer, Radio Regulations 909, 911). In February 1955, Premier and Ohio Valley petitioned for reconsideration requesting deletion of both commercial VHF assignments. The Commission instituted a rule making proceeding (in which Mid-America participated) to deintermix the Evansville-Hatfield area (20 F.R. 2197), but on November 10, 1955, terminated the proceeding before any decision on the merits simultaneously with the institution of Docket No. 11532 dealing with the UHF–VHF problem on a nationwide basis (20 F.R. 8501). See *Coastal Bend Television Corp.* v. *United States*, 234 F. 2d 686 (C.A.D.C.).

that "there is any need to institute further rule making or to amend the notice of rule making in this proceeding" (21 F.R. 8196).

Moreover, on August 24, 1956, Evansville TV filed a petition requesting withdrawal of the instant notice of proposed rule making on the ground that it was entitled, as permittee of Channel 7, to a full evidentiary hearing under Section 316 of the Communications Act (J.A. 3–5). The Commission denied this petition on November 28, 1956 (released December 3, 1956), basically for reason of prematurity, noting (J.A. 7–8):

> * * * The Notice of Proposed Rule Making in Docket No. 11757, to which petitioner objects, is merely a proposal, which may or may not be adopted in the form proposed. Only after consideration of the requested comments and any counterproposals that may be submitted will we be in a position to judge the proposal on its merits, both legal and factual.

The comments and counterproposals, including those involving Channel 9 and various UHF channels not specifically mentioned in the Notice of Proposed Rule Making, were filed on December 3, 1956.[1] On December 28, 1956, Evansville TV filed a lengthy

[1] On December 12, 1956, various counsel appearing in 14 deintermixture proceedings, including counsel for Evansville TV, filed a petition for extension of time for filing reply comments in each of these proceedings on the ground, *inter alia*, that the comments "include counterproposals suggesting channel changes not included in the Notices of Proposed Rule Making and not heretofore revealed in earlier pleadings" (R. 436). The Commission granted a ten-day extension to December 28, 1956 (R. 440–441).

reply comment which challenged the Channel 9 counterproposals both under Section 4 of the Administrative Procedure Act and on the merits (R. 712–736). On the same date, Owensboro moved to strike the Channel 9 counterproposals but did not discuss the merits (J.A. 13–15).

In its Report and Order of March 1, 1957, the Commission noted that the Notice of Proposed Rule Making (21 F.R. 4972, 4973) had referred to the Report and Order in Docket 11532 (21 F.R. 4958) which treated at some length the need for *area* deintermixture (21 F.R. at 4962). It found that Evansville and Hatfield are in the same area, since they are only 21 miles apart and a station in one would place a Grade A signal over the other (J.A. 32). The Commission concluded that the notice was sufficient, under the circumstances of this case, to encompass Channel 9 particularly in view of the fact that the parties had actual notice that Channel 9 was involved and ample opportunity to submit comments in reply to the counterproposals (J.A. 32–33). The Commission accordingly denied the Owensboro motion to strike the counterproposals (J.A. 31–33).

On March 29, 1957, Evansville TV, but not Owensboro, filed a petition for reconsideration again challenging the Commission's order with respect to Channel 9 both procedurally and on the merits (J.A. 37–52). The Commission denied reconsideration and reaffirmed its rule making actions in a Memorandum Opinion and Order released on June 24, 1957 (J.A. 52–55).

On appeal, the Court of Appeals (Judge Fahy dissenting) affirmed the Commission's actions (Pet. O. App. 1a–16a). The court upheld the Commission's determination that deintermixture of the Evansville area would serve the public interest, as "valid" and within the Commission's "competence" (Pet. O. App. 11a–12a). The court further held, "particularly on the facts of this case", that Channel 9 was within the scope of the proceeding since there had been both actual notice of the Channel 9 counterproposals and a sufficient description in the Notice of Proposed Rule Making of the subjects and issues involved, as required by Section 4(a) of the Administrative Procedure Act (Pet. O. App. 12a–14a). Petitions for rehearing *en banc* were unanimously denied (Judge Miller not participating) (Pet. O. App. 17a).

ARGUMENT

The question presented is narrow, turns on the particular facts, and lacks general importance.

Petitioners' principal contention (Pet O. 8–20; Pet. M. 9–16, 22) is that the decision below will have a widespread impact on Commission and other agency rule making proceedings by exempting counterproposals from the notice requirements of the Administrative Procedure Act. This overlooks the statement of the court below that it had "no intention whatever of accepting a Commission's plan of convenience as a substitute for compliance with the rule making notice requirements of § 4 of the Administrative Procedure Act" (Pet. O. App. 12a). The Court of Appeals merely concluded (Pet O. App. 12a–14a) that the

Notice of Proposed Rule Making here was, under the circumstances, sufficient to apprise interested persons that consideration might be given to counterproposals involving shifts in other channels serving Evansville, and that the eventual Commission order involving Channel 9 was reasonably related to the deintermixture of Evansville proposed by the Notice. Nothing in this determination, based "particularly on the facts of this case" (Pet. O. App. 12a), purports to establish any general rule that counterproposals can expand a rule making proceeding beyond the area reasonably encompassed in the notice of proposed rule making.[8] As petitioners Owensboro admit (Pet O. 19), the Commission customarily issues a notice of further rule making where it is necessary to afford interested persons an opportunity for full participation.

Contrary to petitioners' further contention (Pet. O. 12–17; Pet. M. 16–18, 21–22), the decision below does not rest on any finding that the notice requirements of the Administrative Procedure Act were here met because petitioners had actual notice in lieu of publication or because they had an opportunity to petition for reconsideration of the Commission's order. The court's holding is that the Notice itself contained a sufficient "description of the subjects and the issues involved as required by § 4(a)" (Pet. O. App. 12a). In resolving any possible ambiguity in the

[8] Judge Fahy, dissenting, disagreed only with the factual determination that the instant Notice was sufficient, and indicated that any deficiency might have been cured had the Commission announced its construction of the Notice by ruling on the procedural objections of the Owensboro petitioners prior to issuance of the March 1, 1957, order (Pet. O. App. 16a).

Notice in favor of its sufficiency, the Court of Appeals properly made a "realistic appraisal of the background for the action of the Commission" (Pet. O. App. 12a–13a), including the fact that petitioners were aware of the potential involvement of Channel 9, both from the earlier history of the deintermixture proceedings involving the Evansville area and from their actual knowledge of the counterproposals, and had ample opportunity, by way of reply comments or petitions for reconsideration, to meet the specific arguments relating to Channel 9 advanced in the counterproposals.

Finally,[*] there is no conflict between the decision below and *Hotch* v. *United States,* 212 F. 2d 280 (C.A. 9). As the court below pointed out (Pet. O. App. 14a, n. 13), *Hotch* was not concerned with the sufficiency of a notice of rule making which had been published in the Federal Register "since neither the proposed regulation nor the regulation itself * * * was ever published" (212 F. 2d at 284). The absence of any publication prior to the issuance of a regulation making certain acts criminal was held in *Hotch* to preclude a conviction. The holding here as to the sufficiency of a published notice is clearly distinguishable and in accord with applicable authority. *Logansport Broadcasting Corp.* v. *United States,* 210 F.

[*] Evansville TV's additional argument—that the Commission decision to remove Channel 9 from commercial use in the area is invalid because of the lack of finality of the proposed Channel 7 shift to Louisville (Pet. M. 23)—was rejected by the court below without discussion (Pet. O. 12a) and clearly presents no question of importance warranting further review.

2d 24, 28 (C.A.D.C.); *Van Curler Broadcasting Corp.* v. *United States*, 236 F. 2d 727 (C.A.D.C.), certiorari denied, 352 U.S. 935. Cf. *American Trucking Associations* v. *United States*, 344 U.S. 298, 307; *Civil Aeronautics Board* v. *State Airlines*, 338 U.S. 572; *City of Dallas* v. *Civil Aeronautics Board*, 221 F. 2d 501 (C.A.D.C.), certiorari denied, 348 U.S. 914.

CONCLUSION

The petitions for writs of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 889

DOUGLAS H. McDONALD, TRUSTEE, *Petitioner*

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Contrary to the contentions of respondents, this case involves a problem of broad significance relating to the rulemaking functions of regulatory agencies. It presents a direct test of the Commission's counter-proposal procedure. The Commission holds many rulemaking proceedings to consider changes in specific allocations contained in the Table of Television Assignments. It has fallen into the habit of never defining the scope of the proceeding in its notices of proposed

rule making initiating such proceedings. It merely invites comments addressed to the proposed allocations rule specifically set forth in its notice, as well as comments suggesting "counterproposals," and then, if it feels that a rule proposed as a "counterproposal" is one "falling within the general scope of the rulemaking proceeding," it will adopt it as the final rule in the case. An essential defect in this procedure is that the notice merely mentions a specific proposed change and and does not indicate how far beyond that rule the "general scope of the rulemaking proceeding" extends, leading to the jungle of confusion that WTVW has described in its Petition (Pet. 13-16). Here the Commission proposed "Evansville . . . Delete Channel 7" and adopted the rule: "Hatfield . . . Delete Channel 9," specifically relying on a purported power to adopt, without further notice, counterproposals falling within some undefined "general scope" of the proceeding (J.A., p. 53; par. 3, June 24, 1957, Memorandum, Opinion and Order).

There is no requirement that comments in rulemaking proceedings be served on anyone, because the identity of all persons interested in the rule making cannot be known. Thus, counterproposals which may be adopted in the case never come to the attention of persons who may have a direct interest in them, and such persons are deprived of the opportunity to comment. The respondents ignore the fact that the Commission had no way of knowing whether or not WTVW and the Channel 9 applicants were the only persons interested in the suggestion in comments that Channel 9 be deleted, and that the Commission could consequently have no legal choice except to issue a further notice announcing that the potential deletion of Channel 9 was part of the proceeding.

Respondents state:

> "As petitioners Owensboro admit (Pet. O. 19), the Commission customarily issues a notice of further rule making where it is necessary to afford interested persons an opportunity for full participation." (Resp. Br. 11).

It is true that there have been cases where the Commission has recognized the existence of Section 4 of the APA and has issued a further notice as a result of the submission of counterproposals. The termination of this case in its present posture portends the total extinction of such instances. Of course, the respondents do not deny, as they cannot, that the "counterproposal" procedure is a part of Commission practice. Indeed, the Commission here called it "well-established," and the Committee on Communications of the Administrative Law Section of the American Bar Association in its 1958 Report (in which no attorney for any of the petitioners played any part) expressed grave concern as to the legality of that procedure (WTVW Pet., App. C).

The only thing the respondents point to in support of their assertion that the June 26 Notice contained a "description of the subjects and issues involved" is the Report and Order in Docket No. 11532, which is referred to in the Notice. Respondents say that in that Report and Order the Commission "treated at some length the need for *area* deintermixture." (emphasis in original) (Resp. Br. 9). Yet, the respondents themselves in their footnote 5 quote from paragraph 31 of that document which alluded to "community or area" deintermixture. WTVW in its Petition showed through quotations that throughout that document the Commission spoke in terms of "community" deinter-

mixture: That Report and Order is a lengthy and ambiguous document, which could not legally alter the Notice, which by its terms limited the proceeding to changes with respect to Channel 7. Indeed, in paragraph 2 of the Notice, the Commission indicated that the Report and Order related to deintermixture of "individual communities," not to "areas."

Respondents also refer to matters and events not even alluded to in the Notice to justify their contention that Channel 9 could be deleted in the proceeding. They, as did the Court of Appeals, ignore the Congressional direction that notice must be "complete and specific" and assert, in effect, a legal principle that a private person must reason, infer, and deduce from history and extraneous events what rules are within the scope of a proceeding.

That the public did not know that the potential deletion of Channel 9 was involved is obvious from the fact that no one opposed the deletion of Channel 9 in the initial comments filed on December 3, 1956. The only thing in this record in opposition to the deletion of Channel 9 before the final decision was WTVW's brief opposition to that suggestion in its reply comments filed December 28, 1956, not as comments on the merits of the proposal, but to urge that the Commission reject the proposal at the threshold without issuing a further notice. There is voluminous material in this record before the final order in opposition to any change with respect to Channel 7, but a void exists with respect to similar material relating to Channel 9. The reason is that the scope of the proceeding was kept secret by the Commission. Channel 9, Hatfield, which two applicants had fought for during three years, was too valuable a commodity to be dis-

posed of in such a clandestine fashion. However, a further notice was not only fair, but was legally required by Section 4 of the APA.—

Respondents assert that, contrary to WTVW's arguments between pages 16 and 18 of its Petition, "the decision below does not rest on any finding that the notice requirements of the Administrative Procedure Act were here met because petitioners had actual notice in lieu of publication. . . ." (Resp. Br. 11). Not only do respondents contradict the Court's opinion, but they contradict themselves, for elsewhere in their brief they state that the Court "further held . . . that Channel 9 was within the scope of the proceeding since there had been actual notice of the Channel 9 counterproposals . . ." (Resp. Br. 10). "Actual notice" as used in Section 4 refers to knowledge of the agency's notice of rule making, in which the scope of the proceeding is supposed to be defined, not to knowledge of what a private person says in comments. The phrase was misinterpreted by the Commission and the majority below.

Respondents also contend that, contrary to WTVW's arguments between pages 21 and 22 of its Petition, the decision below does not rest on any finding that the Section 4 requirements were met because the Channel 9 applicants had the opportunity to petition for reconsideration (Resp. Br. 11). The following part of the decision of the majority below can only be construed as permitting deficiencies in an agency's observance of the Section 4 procedures to be remedied by the opportunity to petition for reconsideration:

> "The Owensboro-appellants thus again had full opportunity, then and there to act, with detailed knowledge of all aspects of that Report and Order.

> They were already in the case as parties. Even were it to be granted that there was some substance to their claim of lack of earlier notice of the full import of the contemplated rule making, after their motion to strike had been denied and the Commission's Report and Order had issued on March 1, 1957, they certainly were fully advised in the premises. They could have sought reconsideration under § 405 of the Act.' But, they chose to take no further steps." (p. 11, Slip Opinion).

Respondents cite five cases at the end of their brief, none of which is here applicable:

A. *Logansport Broadcasting Corp. v. United States*, 210 F. 2d 24, was an appeal from the nationwide rulemaking proceeding lasting over 43 months, and in which about 2,000 television assignments, comprising the Table of Assignments, were adopted. There the Commission did define the scope of the proceeding, putting everyone on notice that it was a nationwide proceeding involving channel assignments all over the country. The Commission went further and issued several intermediate notices of proposed rulemaking inviting comments on specific proposed allocations. Here, however, a limited notice, which by its terms involved only VHF Channel 7, became, through application of the counterproposal procedure, the basis for an expanded proceeding, whose scope the agency decided at last to announce in its final decision. The Commission here could have easily and conveniently issued a further notice and the proceeding could have been resolved quickly thereafter. Judge Fahy concluded that the Commission was obliged to rule on the objections to the involvement of the deletion of Channel 9 before actually deleting the channel, which (based on the outcome of the proceeding) would have been a

further notice that the deletion of Channel 9 was involved. *Logansport* also is distinguishable from this case since the Court there was ruling only on the claim of absence of notice of factors to be used in deciding whether the rule should be adopted, while this case involves the absence of notice of the very subject of the rule.

B. *Van Curler Broadcasting Corp.* v. *United States*, 236 F. 2d 727, was not even remotely related to the problem of notice of the scope of a proceeding. The Commission's notice there proposed the assignment of Channel 10 to Vail Mills, New York, and that was the rule adopted in the case.

C. In *American Trucking Assns.* v. *United States*, 344 U.S. 298, the ICC instituted a rulemaking proceeding concerning the adoption of proposed rules for the motor carrier industry, including rules pertaining to "trip leasing." The order instituting the proceeding declared all authorized carriers as parties respondent and set forth the practices to be investigated, four possible schemes of regulation, and suggested rules. About 80 witnesses presented testimony, after which the Examiner issued a report and proposed rules. The Examiner proposed rules abolishing trip leasing, but Division 5 of the ICC decided that it should be permitted, and amended his proposal. Objections were filed with the Commission and oral argument was held. The Commission's final report in effect adopted the Examiner's proposed rules.

One difference between that case and this is that there the Commission made all motor carriers who would be affected by the proposed rules parties to the proceeding, while here the Commission never hinted that the Channel 9 applicants were parties to this

proceeding. Secondly, there the original notice instituting the proceeding put all parties on notice that the potential abolition of trip leasing was involved, while here the original notice did not hint that Channel 9 might be deleted. Furthermore, the appellants there, unlike the petitioners here, made no claim that the notice requirements of Section 4 of the APA had been violated. In this respect, the Supreme Court stated: "There is no question but that the Federal Register notice and participation requirements were satisfied." (Footnote 18, 344 U.S., at p. 319). Another distinction is that in *American Trucking*, even if the original order did not give notice that trip leasing was involved (and the contrary was true), the Examiner's proposed rules did and there was ample opportunity to challenge the abolition of trip leasing before the rules were finalized by the ICC. Here, on the other hand, the final deletion of Channel 9 was the notice.

D. In *Civil Aeronautics Board* v. *State Airlines*, 338 U.S. 572, Piedmont* and State had applied for different routes in a geographical area including all or part of 14 southeastern states. After consolidated hearings on the applications of State, Piedmont, and 23 other applicants for routes in the same general area, the Board awarded Piedmont new routes not specifically sought in its application and more nearly approximating those sought by State. State attacked this order on the ground, among others, that since Piedmont had not applied for the particular routes certified, State had had insufficient notice that the Board might consider Piedmont as a competing applicant, and hence had had no fair opportunity to present evidence dis-

* The summary of this case is a paraphrase of the summary contained in *City of Dallas* v. *Civil Aeronautics Board*, 94 U.S. App. D.C. 75, 221 F. 2d 501.

crediting Piedmont's fitness to serve those routes. The Court held that there was sufficient notice to State, even though Piedmont's application covered routes which differed from those awarded. The Court noted, in part, that State sought certificates in the same general area, was a participant in the same proceedings, and had argued against Piedmont before the Board. In short, State recognized Piedmont as a potential competitive applicant.

That case is inapplicable here since it was an adjudicatory proceeding involving interpretation of the Board's licensing power under Sections 401 (d) (1) and (2) of the Civil Aeronautics Act, while the present case involves the standards set forth in Section 4 of the APA. It is inconceivable that the requirements of Section 4 could be read out of the APA insofar as the Commission is concerned on the basis of a case which did not involve Section 4. Furthermore, State Airlines had been named as a party to that proceeding and knew that evidence presented by the 24 other parties might have a bearing on its chances for success. Here, however, the Channel 9 applicants never were apprised of the fact that they were parties, and did not regard themselves as such, as witnessed by their Motion to Strike. Moreover, the *State* case was initiated as a result of public applications by carriers for routes connecting chains of cities in a number of states, while this case was initiated by a limited Notice relating to one VHF channel. If the Commission is to convert limited television proceedings into regional or nationwide allocations proceedings, it is compelled by Section 4 to state in a notice that that is what the proceeding is about. Of course, even where a proceeding is announced as regional, the Commission should still define the geographical limits of the region, or else

confusion will exist as to what channel assignments and cities are encompassed within the proceeding. This Court should require the Commission to start to tell the public what the scope of these allocations proceedings encompasses.

E. The respondents also cite *City of Dallas* v. *Civil Aeronautics Board*, 94 U.S. App. D.C. 175, 221 F. 2d 501, cert. den. 348 U.S. 914. That case followed and applied the holding of the *State Airlines* case, and the same matters which distinguish the holding in the *State Airlines* case are applicable to the *Dallas* case.

CONCLUSION

For the foregoing reasons, in addition to those heretofore urged in the petition for writ of certiorari herein, it is respectfully submitted that said petition for writ of certiorari should be granted.

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